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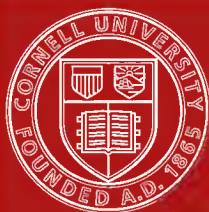
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COMMENTARY
ON
MECHANIC'S LIEN LAW

FOR THE STATE OF NEW YORK

CHAPTER XLIX. OF THE GENERAL LAWS (BEING
CHAPTER 418 OF THE LAWS OF 1897), AND TITLE
III., CHAPTER XXII. OF THE CODE OF
CIVIL PROCEDURE

TOGETHER WITH THE
TEXT OF THE ABOVE, FORMS AND A TABLE OF CASES WITH
REFERENCES TO ALL SERIES OF REPORTS

ENLARGED EDITION

BY

EDWARD L. HEYDECKER

OF THE NEW YORK BAR, EDITOR OF GENERAL LAWS OF NEW YORK, THIRD REVISED
EDITION OF SMITH ON CHATTEL MORTGAGES, ETC.

ALBANY, N. Y.
MATTHEW BENDER
1900.

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PREFACE.

REAL property has constituted, and under our civilization must continue to constitute, the greater part of human wealth. Man's efforts have largely been directed, and must continue to be directed, to "improve" this great possession. Apart from all other reasons, the permanency, visibility and tangibility of real property will always make it a desirable investment as compared with the changing, unstable forms of personal property, and the rent return from "improved" property will always direct men's attention to that or to thoughts of "improving" unimproved property.

But the operation of the rule of law which transfers all fixtures to the owner of the fee makes the performing of labor or the furnishing of materials for these improvements become a business risk on the part of those who engage in it quite different from that assumed by the merchant who sells goods and chattels out of his stock in trade, or by the mechanic who performs labor upon the chattel entrusted to him for that purpose; for the merchant may protect himself, upon a breach of contract, by replevin or by an execution after judgment had, and recover back his goods or their money equivalent; and the mechanic may demand his compensation before returning the chattel on which he has been working. The materialman or laborer, however, who has been

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furnishing materials or building with such materials a house or other improvement, has no claim against the owner on the land (outside of the Lien Law), and frequently finds that his contract rights against the contractor are valueless, while the fruits of his labor or materials are plainly apparent in the enhanced value of the "improved" property.

To remedy this, to give such materialman or laborer something like the protection which the very *movableness* of chattels gives to those who deal in chattels, has been the design of the framers of all mechanic's lien laws. The problem, of course, is greatly complicated by the lack of privity between the owner and the materialman or laborer, and the effort to protect the one without unduly burdening the other must always continue a problem.

The act of 1885, partly from the ability and care with which it was drawn and partly from the fact that it was general in its terms and applications, thereby superseding all the old local laws, came nearer to this desired end than any of its predecessors in this state or any of its neighbors.

Now the Commissioners of Statutory Revision have reached, in their labors, this division of the Statutes, and have codified the laws existing up to this date into the "Lien Law," which is Article I. of Chapter XLIX. of the General Laws. In this codification the bulk of the act has been reduced by avoiding much needless repetition, definitions have been introduced and carefully framed, and many slight changes and extensions or curtailments of the former act made to fit the rules as evolved in the various decisions construing it. Enough changes have been introduced to make it necessary for the practitioner

to study the act carefully before using any of the old forms or precedents.

The chief additions to the act are the clauses providing for the recording of assignments of liens (section 14); for the filing of a *lis pendens* whether the action to foreclose the lien be in a court of record or not of record (section 16); for the filing of the building loan contract (section 21); for the dating back of the title of a purchaser at a judicial sale to the time of such sale (section 2); and for preservation of the right to file a lien notwithstanding the death of the owner (section 10).

In connection with the new Lien Law all the questions affecting practice have been cut out of the old act and have been added to the Code of Civil Procedure as a new title under the sections 3398 to 3419. Here again appear a number of slight changes which make necessary a careful examination of the old forms and precedents before they can be used. The chief changes are the provisions requiring the joinder as parties defendant of all persons appearing by the records in the office of the county clerk or register to be overseers of such property or any part thereof (section 3402); permitting two or more lienors having liens on the same property to join as plaintiffs (section 3402); changing some of the rules as to time in courts not of record (section 3403); and carefully regulating the proceedings for the deposit and withdrawal of money or securities after action has been brought (section 3413).

The act of 1885 repealed all the local laws, and there then remained in force, besides the act of 1885, the act of 1878, known as the Public Works Act; the act of 1872, relating to wharves, etc.; the act of 1870, affecting railroads; the act of 1875, affecting railroad employees;

the act of 1880, relating to oil wells. All of these have now been repealed and their provisions (with modifications) embodied in the Lien Law (Chapter XLIX. of the General Laws).

In the following pages the aim has been to treat the subject as a separate branch of the law not merely to annotate the act. It is believed that the interests involved are so great, both in property and in number of persons interested, as to warrant such treatment. The author, therefore, has endeavored to examine the act and all decisions construing its predecessors, the acts of 1885, 1878, etc., with a view, first, to ascertain the principles of law applicable, and second, to note the practice to be followed. The new amendments to the Code (as did the act of 1885) definitely declare that the practice to be observed shall follow that of actions to foreclose mortgages on real estate, thereby making it a proceeding in equity ; and the principles laid down in the amendments, in connection with the statement that it is a remedial act and to be construed liberally, added to the equitable procedure prescribed, have properly induced the courts to treat the whole subject as a branch of equity. The attempt is made to present the whole subject in a logical division which will readily submit itself to the immediate need of the practitioner, and enable him without difficulty to find all the passages of the act and their judicial interpretations gathered on any point which comes before him. All citations in the text are of decisions under the acts now consolidated, and refer to one series of reports only ; but in the Table of Cases will be found references to all publications of the decision referred to, and when the decision can be followed up or down in the reports, reference thereto is

made ; citations have been brought down to September 1, 1897.

The forms, as far as possible, have been taken from actual precedents or from decisions which have definitely pointed out some error to be avoided or some form to be followed, and have been carefully reviewed in connection with the new Lien Law and Code Amendments.

111 BROADWAY, NEW YORK,
September 1, 1897.

PREFACE TO ENLARGED EDITION.

Three years have passed since the first edition of this book. In that period nearly one hundred decisions have been reported, many of which are of great importance in this branch of the law. That fact, together with the reception which the work has received at the hands of the Bar, has induced the preparation of an enlarged edition. The new decisions and the changes and rules flowing out of these are presented in a Supplement, in which the arrangement of the first edition has been followed, chapter by chapter. If, then, after consulting the body of the work, the practitioner will turn to the corresponding chapter heading in the Appendix, he will have before him all the decisions on that division of the subject.

The Index covers the whole work, and refers to the Supplement as well as the body of the work.

New York, August, 1900.

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COMMENTARY

ON

MECHANIC'S LIEN LAW.

CHAPTER I.

WHO MAY ACQUIRE THE LIEN.

(A.) THE CONTRACTOR.

THE act of 1885 was very broad in its language, and extended its benefits to any one who was capable of contracting, whether it was a person, firm, corporation or association (section 1, act of 1885). The new Lien Law, while not using the same phraseology, in no way limits this wide extent of the act. All that is needed is the performance of labor or the furnishing of materials for the improvement of real property ; and the law carefully defines an "improvement" to be the erection, alteration or repair of any structure upon, connected with or beneath the surface of any real property and any work done upon such property, or materials furnished for its permanent improvement (section 2). "Real property" in like manner is defined to include

real estate, lands, tenements and hereditaments, corporeal and incorporeal, fixtures and all bridges and trestle-work, and structures connected therewith, erected for the use of railroads, and all oil or gas wells and structures and fixtures connected therewith, and any lease of oil lands or other right to operate for the production of oil or gas upon such lands, and the right or franchise granted by a municipal corporation for the use of the streets or public places thereof, and all structures placed thereon for the use of such right or franchise (section 2). A contractor is defined to be a person who enters into a contract with the owner of real property for the improvement thereof. (section 2).

A contractor may act through an agent and afterwards file a lien in his own name, and it will be sustained on proof of his agency. (*Berry v. Gavin*, 88 Hun, 1.) A sub-contractor told the contractor that he was doing business in his wife's name, but did not say that it was his wife and not he that was making the contract, yet the wife filed a lien and it was held good. (*Stapleton v. Mayer*, 17 Misc. 67.)

The acceptance by the owner of an order drawn on him by the contractor to pay sub-contractor the amount of their bill out of contract price on completion of work does not substitute them as contractors in place of the original contractor. (*Kennedy v. McKone*, 10 App. Div. 88.)

No one is estopped from being a contractor, and the fact that an architect is also a builder does not preclude him from taking a contract and filing a lien. (*Marshall v. Cohen*, 11 Misc. 397.) The relation of owner and contractor may arise from a change of circumstances, although the parties did not originally intend to assume such relations. So where a lienor claimed under a written contract and

it appeared that he supposed he had guaranteed the contract of another, but the evidence showed that the owner had dealt with him as contractor, it was held sufficient. (*Marshall v. Cohen*, 11 Misc. 397.)

It sometimes happens that the contract is abandoned and the work stopped before all the material which has been delivered on the premises has been used ; if, under such circumstances, the owner uses any material left upon the premises by the contractor, a new relation arises between them—*i. e.* of vendor and vendee—and the contractor may file and sustain a lien for the value of the materials so used. (*Wollreich v. Fettretch*, 21 State Rep. 56.) But it is very doubtful if a sub-contractor has such right. (*Hutton Bros. v. Gordon*, 2 Misc. 267.)

While the act gives the contractor the right to file a lien, he may stipulate in his contract not to do so, and if he does, this may be enforced against him. (*Matthews v. Young*, 16 Misc. 525.)

The distinction between a lien for the improvement of private property and one on a public improvement is that the former binds the private owner's interest, which may be adjudged to be sold to satisfy the lien, while the latter binds only the fund appropriated by the state or the municipality for the improvement. As in the latter case there is a fund at hand and the holder of the fund—the state or the municipality—stands obligated and ready to pay the person with whom it has contracted, there is no need of giving the contractor for a public improvement a lien on the fund which already belongs to him, provided there are no liens upon it by his sub-contractors ; hence no lien is given such a contractor, but it is given only to his sub-contractors and materialmen.

(B.) SUB-CONTRACTORS AND MATERIALMEN.

The act of 1885 defined sub-contractors by saying that "all persons, firms, corporations or associations entitled to liens under the provisions of this act, except those who have contracted with the owner, shall be deemed sub-contractors" (act of 1885, section 20). This made it possible for any one who had performed labor or services or furnished materials, in a way that would have permitted him to file a lien if he were the contractor, to have his lien, no matter how many intermediate sub-contractors might stand between him and the chief contractor or owner. Now the Lien Law defines "sub-contractor" to mean a person who enters into a contract for the improvement of real property with a contractor, or with a person who has contracted with or through such contractor, for the performance of his contract or any part thereof (section 2). "Laborer" is defined to mean any person who performs labor or services upon such improvement (section 2); and "materialman" is likewise defined to be any person, other than a contractor, who furnishes material for such improvement (section 2). Though the wording is changed, the scope of the act is not limited, and accurate definitions have been substituted for the looser phraseology of the old act.

Any one who has performed labor or services or furnished materials, in a way that would permit him to file a lien if he were the contractor, may have his lien, no matter how many intermediate sub-contractors may stand between him and the chief contractor and owner. (*Vogel v. Luitwieler*, 52 Hun, 184.) The only thing therefore to be considered is whether the labor and services or

the materials furnished come within the provisions of the act, which will be discussed later. (See pp. 57-59.)

The benefit of the act extends to all who furnish materials or perform labor toward the erection of the building, and the questions, where the parties reside, where the material is prepared or where the payment is to be made, are immaterial. (*Campbell v. Coon*, 149 N. Y. 556.)

So that the lienor may be a resident of New Jersey, for example, or a foreign corporation, and may contract to prepare the material outside of the state or to deliver it to the builder outside of the state, and to receive payment outside of the state, and may yet have a lien, for the only question is, were the materials used in the construction of the house on which the lien is claimed.

The act is intended to inure to the benefit only of the men who perform the labor or furnish the materials, but an assignment of the sub-contract, with the consent of the owner, before the work under it is begun, gives the person to whom the contract is assigned the right to file a lien in his own name, as the person doing the work. (*Schalk v. Morris*, 7 Misc. 20.)

As the lien is merely the security for the debt due the lienor, it must follow the debt, and so, if the contractor or sub-contractor assigns the note taken by him in payment before its maturity and it is subsequently dishonored, he may then assign the lien, and the person to whom the lien is assigned may foreclose the lien and surrender the note on the trial. (*Linneman v. Bieber*, 85 Hun, 477.)

But the mere purchase of a debt from a sub-contractor would not carry with it the right to file a lien; for only the person doing the work or furnishing the material can

have a lien. But when a partner, after a contract has been taken in the firm name, buys out his partner and files a lien in his own name, it will be sustained. (*Ogden v. Alexander*, 140 N. Y. 356.)

Contracts for municipal improvements have been brought within the scope of the mechanic's lien laws since 1878; and the provisions for giving the right to a lien are as broad in this class of contracts as in those for the improvement of private property.

The Lien Law now declares that any person performing labor for or furnishing materials to a contractor, his subcontractor or legal representative, for the construction of a public improvement pursuant to a contract by such contractor with the state or a municipal corporation, shall have a lien, etc. (section 5). This widens the previous law by bringing state contracts within its scope. The wording of the former act was much more cumbersome, but its meaning was the same as the present act, except as noted above (chap. 315 of 1878, section 1).

The act of 1878 gave a lien to *any person or persons, firms or corporations* (act of 1878, section 1). The new Lien Law speaks only of *a person* (section 5). But a corporation is a person and can have a lien. (*Gaskell v. Beard*, 58 Hun, 101.)

There was apparently some doubt on the subject of the right to a lien by a foreign corporation, which had not complied with the requirements of the General Corporation Law, requiring a certificate to be issued to it before it can do business in this state. It was first held that such a corporation could have no lien (*Neuchatel Asphalt Co. v. The Mayor, etc.*, 9 Misc. 376); but later the same company, having obtained the certificate, was allowed its lien, although the certificate was obtained

after the contract was entered upon. (*Neuchatel Asphalt Co. v. The Mayor, etc.*, 66 State Rep. 721.)

(C.) ASSIGNMENTS OF LIENS.

The courts have heretofore recognized assignments of liens (*English v. Lee*, 63 Hun, 572); but there was no formal provision for such in the statute. Now it has been added (Lien Law, § 14), and such assignments are to be filed and docketed in the same way as liens. Consequent upon this, it is provided that while the validity of an assignment not docketed shall not be affected in other ways, only the holders of such docketed assignments are necessary parties to actions or entitled to the benefit of the provisions of the law forbidding payments by owner in certain cases; in other words, the general principles of recording acts apply.

As such assignments are not limited to liens for the improvement of private property, they must be held to be applicable to liens for public improvements as well.

CHAPTER II.

THE CONTRACT.

(A.) THE ORIGINAL CONTRACT.

THE Lien Law (following the act of 1885) gives every sub-contractor, laborer or materialman, who is at work on the job, the right to demand of the owner or his agent the terms of his contract with the contractor and the amount still due him under the contract ; and if the owner or his agent refuse this information or falsely state the terms of the contract, he shall be liable to such sub-contractor or materialman for any loss which he may suffer by such refusal or false statement, and it provides that a return of execution unsatisfied against the contract debtor of such sub-contractor or materialman shall be presumptive proof of loss against the owner (section 8).

This, of course, is intended to enable the sub-contractor to protect himself by filing a lien promptly, if, for any reason, he may think his right to payment to be imperilled.

This right to demand the terms of the contract has not been extended in the Lien Law to public contracts, probably for the reason that such information would hardly be refused by a public official, on proper demand made.

The new Lien Law aims to protect sub-contractors in a new way by requiring that a contract for the sale of land

with a building loan, and any modification thereof, must be in writing, and within ten days after its execution be filed in the office of the clerk of the county in which any part of the land is situated. If not so filed, the interest of each party to such contract in the real property affected thereby is subject to the lien and claim of a person who shall thereafter file a notice of lien. No modification of the contract shall affect rights or interests of those already working on the job. Provision is made for filing and docketing such contracts (section 21).

(B.) EXTRA WORK.

There was no mention of "extra work" in the former act of 1885, and there is none in the new Lien Law ; but a lien based on such a claim is good, provided the other elements are present, such as consent of owner, etc.

The basis for a claim for "extra work" is, of course, a contract supplemental to the original agreement, and the difficulties encountered on such claims are the usual ones of insufficient proof on the two questions, first, of the meeting of the minds on the agreement, and second, the value of the work or materials furnished.

Claims for extra work may arise from two sets of circumstances : first, where there is a written agreement, definite in its terms, and the claim is based on work or materials clearly outside of this agreement ; or, second, the claim may arise out of a controversy as to whether the extra work is or is not included in the original agreement, the difficulty being found in the vagueness or looseness of that agreement.

In such cases, claimants frequently fall back on proof of what is the custom of the trade in question, but often

it becomes a mere question of construction of language by the court, as where it was decided that "blasting rock" was not included in "excavating." (*Helwig v. Blumenberg*, 28 State Rep. 75.)

It is no defense to a claim for "extra work" that neither party had resorted to the provision in the contract for arbitration when a dispute arises as to what is extra work. (*Carney v. Reilly*, 18 Misc. 11.)

On the question of value of "extra work," it has been held that a contractor is not bound to furnish extra materials and labor at exact cost to himself, but may make a reasonable profit. (*Marshall v. Cohen*, 11 Misc. 397).

As public contracts are carefully drawn in writing and are usually covered by a specific appropriation, questions of "extra work" can hardly arise.

CHAPTER III.

WHAT THE LIEN BINDS.

(A.) THE INTEREST OF THE OWNER.

WHAT the lien binds is one of the great questions under the act, for on that hinges the whole question of security to the mechanic or materialman. The sub-contractor has, of course, his remedy on contract against the contractor, but against the owner, to whom belongs the results of his labor or the materials he has furnished, as soon as they are affixed to the freehold, he has only such claim as the Lien Law gives him. This claim is declared to extend "to the owner's right, title or interest in the real property and improvements existing at the time of filing the notice of lien;" with the proviso that a general assignment for the benefit of creditors shall not prevent the filing of liens as prior claims within thirty days after such assignment.

The wisdom of this proviso, viewed from the standpoint of the contractor or sub-contractor, cannot be doubted, for it reserves to them for thirty days the right to come in on the job in advance of general creditors of the assigning owner.

As the only object of a claim against the owner's interest is security to the lienor, the deposit of money in court to discharge the lien takes the place of the land at once and releases it from the lien. (*Deady v. Fink*, 24 State Rep. 734.)

As the lien binds only the right, title and interest, *at that time existing*, of such owner, when the claim is against a lessee, only the leasehold interest is covered. (*Jones v. Manning*, 25 State Rep. 771; *Southard v. Moss*, 49 State Rep. 225.)

The security given under contracts where the owner is a lessee is thus very slight, for nothing is covered by the lien except the lease, and unless this is on very advantageous terms to the lessee, there is small likelihood that he will protect it or that it will sell for enough to pay the lien claim. The lien does not cover the machinery placed in a building erected on leased ground, for such machinery does not become a fixture and may be removed at will by the lessee (*Havens v. West Side E. L. & P. Co.*, 44 State Rep. 589); and when the lessees, against whom the lien was claimed, abandoned their leasehold after lien filed and the landlord took possession, it was decided that the lien against the boilers was not good, because if the boilers were not fixtures, they were not part of the land, and hence were not lienable; and if they were fixtures, they now belonged to the landlord, the leasehold having been terminated. (*Chamberlin v. McCarthy*, 36 State Rep. 61.)

But the interest of the owner, "at that time existing," whatever it may be, is covered by the lien of a sub-contractor, and no private agreement between owner and contractor that no lien shall be filed can be set up to impair the sub-contractor's rights, even though it be shown that he had actual or constructive notice of such agreement. (*Mosher v. Lewis*, 10 Misc. 373.)

As the lien binds only such interest of the owner as can be sold on execution, no lien can be acquired against a trust estate, for that is inalienable. (*Lang v. Everling*,

3 Misc. 530.) For the same reason, an inchoate right of dower is not subject to a lien, although the wife agreed to pay for the improvement. (*Johnston v. Dahlgren*, 14 Misc. 828.)

The Lien Law now contains a clause which was not in the act of 1885, providing that if any part of the real property subjected to such lien be removed by the owner or by any other person, at any time before the discharge thereof, such removal shall not affect the rights of the lienor, either in respect to the remaining real property, or the part so removed (section 4).

This cannot fail to be of benefit to sub-contractors by preventing the removal of building materials from an unfinished house on which work has ceased for any cause.

(B.) WHAT ENCUMBRANCES ARE PRIOR.

After the liens are filed, questions arise as to priority, not only among the liens themselves, but as to other encumbrances existing or claimed to exist upon the property.

The Lien Law provides that a lien for materials furnished or labor performed in the improvement of real property shall have priority over a conveyance, judgment or other claim against such property not recorded, docketed or filed at the time of filing the notice of such lien; over advances made upon any mortgage or other encumbrance thereon after such filing; and over the claims for work not yet performed or materials not yet furnished on a job, where the owner has made an assignment for the benefit of creditors within thirty days before the filing of lien. The act of 1885 contained the

same provisions, and had the further proviso that purchase-money mortgages should not be in any way affected, which has been omitted from the new Lien Law.

This cuts off all questionable or fraudulent encumbrances and gives the liens, in their order, priority over everything but *bona fide* existing encumbrances. But as the lien is only a lien when it is actually filed, a mortgage recorded prior to the notice of lien, though made with knowledge that the sub-contractor was unpaid, is ahead of the lien, for it is good faith to lend on a mortgage with knowledge that there are possible lien-claims, provided there be none actually filed. (*Munger v. Curtis*, 42 Hun, 465.) For the same reason, when a mortgage was given to secure past and future advances and recorded five days prior to the lien, orders drawn by the owners on the mortgagee, and presented to him prior to the filing of the lien, though not paid until after lien filed, were decided to be payments in good faith, for the mortgage was ahead of the lien. (*Hirshfield v. Ludwig*, 24 N. Y. Supp. 634.)

A practice has grown up whereby an owner contracts for the improvement of his property, agreeing to make advances to pay for the improvements and giving the contractor an option to purchase the property after the improvements have been completed. The contracts have usually been drawn in a way disadvantageous to the materialmen, and sometimes with deliberate intent to defraud them. Yet under the former act, unless the fraud could be shown, there was no remedy. Now, however, the new Lien Law provides that liens shall have priority over advances made upon such contracts, if such advances were made after the time when the labor be-

gan or the first item of material was furnished, as stated in the notice of lien (section 13).

The new Lien Law further provides that if several buildings are erected, altered or repaired, or several pieces or parcels of real property are improved, under one contract, and there are conflicting liens thereon, each lienor shall have priority upon the particular building or premises where his labor is performed or his materials are used (section 13).

If the owner attempts to give a mortgage on the job to the contractor, or some one for him, in part payment, such mortgage will be considered as a trust mortgage for the benefit of sub-contractors who have filed liens. (*Mahoney v. McWalters*, 3 App. Div. 248.)

The new Lien Law contains a clause providing that a mortgage, lien or encumbrance made by an owner of real property, for the purpose of avoiding the provisions of the Lien Law, with the knowledge or privity of the person in whose favor the mortgage, lien or encumbrance is created, shall be void and of no effect as against a claim on account of the improvement of such real property, existing at the time of the creation of such mortgage, lien or encumbrance (section 7). While this provision was not actually embodied in the act of 1885, the courts had so construed the act, and had held that a fraudulent conveyance by the owner without consideration, made to defeat a lienor's claim, may be set aside, and this may be done in the action brought to foreclose the lien. (*Bulkeley v. Kimball*, 19 N. Y. Supp. 672.) And a deed from husband to wife, the only consideration for which is the husband's testimony of business dealings with the wife, will be considered as fraudulent against a lien and set aside. (*Linneman v. Bieber*, 88 Hun, 477.) As only

actual existing *bona fide* encumbrances are prior to a lien, a prior-recorded deed, which was not entitled to be recorded, because of defect in acknowledgment, is not prior to a lien. (*Lemmer v. Morison*, 89 Hun, 277.)

Of course, a private agreement between owner and contractor that any lien filed shall be subsequent to the liens and claims of the owner, who is making the advances, is void against the rights of lienors, whose liens are duly filed. (*Miller v. Mead*, 127 N. Y. 544.)

CHAPTER IV.

THE EXTENT OF THE LIEN.

(A.) THE BALANCE DUE THE CONTRACTOR.

AFTER it has been shown that the interest of the owner is such that it is bound by the lien, the next question is, to what extent is it bound.

There is, of course, no privity of contract between the owner and a sub-contractor or materialman that will enable the latter to call upon the former for payment, simply because the latter is unpaid by the chief contractor. And no contract or agreement to pay on the part of the owner can be implied simply because work has been done or materials furnished to the chief contractor. All that the act does is to give a lien against the interest of the owner to the extent of the amount remaining unpaid under the original contract made between owner and chief contractor. Liens may be filed claiming amounts due the lienor many times in excess of the balance unpaid under the owner's contract, but they cannot impose a liability on the owner greater than the contract price he agreed to pay, less all payments he has already made on account. But while the act thus protects the owner from liability greater than his contract, it protects the lienor by providing that collusive or advance payments on the part of the owner, or payments made by him after notice of lien served on him, shall not be con-

sidered *bona fide* payments, but shall be null and void as against lienors (sections 7 and 11).

In the act of 1885, the rule by which to determine the balance due the contractor was to deduct from the whole contract price the amount paid the contractor plus the value of the work not yet done. The balance was the amount earned and due and hence covered by the liens of the sub-contractors. The new Lien Law declares the rule to be that the balance due the contractor (and hence available to the lienors) is the sum earned and unpaid on the contract at the time of filing the notice of lien and any sum subsequently earned thereon (section 4). The thought is the same ; it is simply another way of stating it. The practical effect of it, however, will be to shift the burden of proof on such questions from the owner to the sub-contractors. While the rule required the deduction of the value of the work yet to be done, it was the owner who necessarily had to bear the burden of showing how much this was ; now, however, the rule gives the lienors the sum earned and unpaid and they must prove what that is.

In the great majority of cases, liens are filed only when work has been stopped, owing to the financial embarrassment of the chief contractor or the owner. In such cases, the equities are complicated by the fact that, the job being unfinished, it is more or less difficult to determine how much, if anything, has been earned and is due from the owner to the chief contractor. This, of course, must be ascertained, before it can be determined that anything is covered by the liens.

In general, all building contracts may be divided into two great classes ; first, those in which no provision is

made for continuance in case of default by the contractor ; and second, those in which it is provided that the owner may proceed, in case of a default by contractor, and deduct the cost of completion from the balance remaining due the contractor under the contract. Contracts under the first head are most favorable to the owner, for in such cases a default on the part of the contractor cuts off his rights and the rights of all who have contracted to work under him and permits the owner to start afresh and make new contract or contracts for completion on his own terms. Contracts under the second head are most favorable for the sub-contractors and materialmen, because under them the owner is treated as the agent of the contractor in completing, and after the cost of completion has been deducted from the balance due under the contract, the difference becomes available to satisfy the lienors.

Building contracts must again be divided by another method into two great classes : first, those in which nothing becomes due until the whole job is completed ; and second, those in which payments become due as certain stages of the work are reached. A contract under this last class is, in reality, a series of contracts in one instrument and, of course, is the most favorable form for contractors and sub-contractors.

The general rules to be applied have been laid down by the Court of Appeals as follows :

1. If anything is due to the contractor, pursuant to the terms of the contract, when the lien is filed, it attaches to that extent.

2. If nothing is due to the contractor according to the contract, when the lien is filed, but a certain amount

subsequently becomes due thereunder, the lien attaches to the extent of that sum.

3. If nothing is due to the contractor pursuant to the contract, when the lien is filed and he abandons the undertaking without just cause, but the owner completes the building according to the contract, and under a provision therein permitting it, the lien attaches to the extent of the difference between the cost of completion and the amount unpaid when the lien was filed. (*Van Clief v. Van Vechten*, 130 N. Y. 571.¹) While this classification is not quite as full as the one given above, it in no way conflicts with it.

Following the classification of the author, it has been decided that under a contract, containing no provision for continuance by owner on breach by contractor, when contractor abandons the work, after receiving all payments due under the contract at the time, the fact that the cost of completion by the owner is less than the balance unpaid under the contract, does not avail the lienors, *i. e.* sub-contractors, for under the act there is nothing "remaining due" to the contractor, to be reached by the lienor. (*Larkin v. McMullin*, 120 N. Y. 206.²) If the abandonment by the contractor be wilful and there is no clause in the contract permitting or requiring the owner to complete, even though the cost of completion be less than the balance due, the sub-contractor can recover nothing, for nothing is due. (*Smith v. Sheltering Arms*, 89 Hun, 70.) But though the contractor abandons the work and there is therefore nothing due him under the contract, yet if there be something due him at the time for "extra work," the lien of a sub-

¹ Reversing *Van Clief v. Van Vechten*, 55 Hun, 467.

² Reversing *Larkin v. McMullin*, 14 Daly, 311.

contractor will reach the money due on extra work. (*Smith v. Sheltering Arms*, 89 Hun, 70.)

Under a contract giving the owner the option of forfeiture or completion at the contractor's expense, if the owner does not, by act or deed, declare a forfeiture, it will be deemed a completion on his part and a lien will attach to the difference between the balance due the contractor and the cost of completion. (*Ogden v. Alexander*, 140 N. Y. 356; *Campbell v. Coon*, 149 N. Y. 56.) But when it is sought to sustain a lien on the ground that owner has elected to complete under contract, after abandonment by contractor, and that cost of completion is less than the balance due under contract, it must clearly appear that owner has so elected, and this will not be inferred when action is brought before building is completed. (*Beecher v. Schuback*, 53 State Rep. 74.)

Turning now to contracts which contain a clause requiring or permitting the owner to complete at contractor's expense, when contractor defaults, it is not the intention of the Lien Law to limit the owner's liability to such portion of the contract price as happens to be payable according to the terms of the contract when the lien is filed. The true question is: What was earned under the contract at the time of the filing of the lien? so that, under a contract, abandoned by contractor and completed by owner, the lien attaches to the difference between the cost of completion and the amount unpaid to the contractor. (*Van Clief v. Van Vechten*, 48 Hun, 305.)

It is not actually necessary that the owner complete the work, in contracts having this clause, but if the cost of the incomplete work can be ascertained and this be

less than the balance due under the contract, a lien will attach to the difference in favor of a materialman. (*Blakeslee v. Fisher*, 66 Hun, 261; *Sheffield v. Læffler*, 20 State R. 890.)

But on the other hand, under a contract giving the owner the right to recover from the contractor the extra cost of completion, in case of contractor's default, when the contract is terminated by the owner, he loses this right to recover the extra cost of completion and cannot offset it against anything due the contractor under his lien. (*Charlton v. Scoville*, 68 Hun, 348.) And if, after part performance by contractor, the contract be terminated because of defective work by the owner, who then tore down to the foundation and rebuilt, using the material already used and other material of the contractor on the ground, the contractor may have a lien for the value of this additional material, less the cost of tearing down. (*Charlton v. Scoville*, 68 Hun, 348.)

Regarding contracts now under the second classification, if there is no provision for payment before completion of the job, abandonment by the contractor cuts off the rights of all under him. When final payment is due only on completion of work, there is nothing upon which to fix a lien, until the work is completed, although the value of the portion unfinished may be much less than the payment to become due. (*Hollister v. Mott*, 132 N. Y. 18; *Lemieux v. English*, 19 Misc. 545.) Where the contract reserves a percentage to be paid only on completion, if the contractor abandons the work, the liens of sub-contractors will not reach this reserve, for that is not due and payable until completion. And if the owner completes at a loss greater than this reserve percentage, there is nothing to which the liens can attach. (*Kelly v.*

Bloomington, 139 N. Y. 343.) And if the owner, without collusion, has paid contractor in advance of terms of contract and after abandonment by contractor, expends more than the balance due in completing, there will be nothing remaining for the lienors. (*Watson v. Cone*, 50 State Rep. 508.)

And if a lienor, after lien filed, stipulate to wait for payment until certain conditions be fulfilled and they are not fulfilled, he cannot enforce his lien. (*Lipman v. Jackson A. I. Works*, 128 N. Y. 58.)

But if the contract be payable in installments, the aim of the courts is to secure the payment of the liens, if possible. Although the contract is incomplete and abandoned by the contractor, yet if there is any sum due and payable to the contractor under the contract, the lien will attach to that extent. (*Wright v. Roberts*, 43 Hun, 413.)

The consequences of the contractor's breach of contract will not be visited on his sub-contractors, if any installment be due ; so, if a contractor substantially completes the work necessary to receive an installment and then abandoned the job, which the owner completed at a loss, yet the lien of a sub-contractor was held to have attached to the money due on the installment earned just before the abandonment, although the contractor himself could have no lien, because of his default. (*Foshay v. Robinson*, 137 N. Y. 134.) And if the default of the contractor be due to the owner's act, as where the architect (the owner's agent), refused a certificate on insufficient grounds and the contractor was forced to make an assignment for the benefit of creditors, the liens of sub-contractors attach to the installment earned under the contract, and after paying them, the balance remaining

passed to his assignee. (*Thomas v. Sahagian*, 32 State Rep. 1057.¹)

The same principles apply as between contractor and sub-contractor that apply between owner and contractor, so, if the chief contractor takes the sub-contract away from the sub-contractor and completes it, the money² so earned on completion becomes subject to the lien of materialmen, who are creditors of the sub-contractor. (*Mack v. Colleran*, 136 N. Y. 617.²)

Sometimes after a contract has been taken by a partnership or by two or more men associated for that purpose, the partners or associates fail to agree or contribute unequally to the result; no equities between the contractors, however, can be availed of to defeat the lien of a sub-contractor, which binds the balance due under the contract to the joint-contractors. (*Pell v. Baur*, 133 N. Y. 377.) But when a mason and a carpenter took a joint contract and then immediately severed it as between themselves, the creditors of each, dealing separately with each, were limited in their liens to the amount due to each upon the severance and could not assert priority of lien to reach the balance due the other joint contractor. (*Vogel v. Whitmore*, 72 Hun, 417.) And the joint contractors, if they are not co-partners and have severed the work as between themselves, may each file a separate lien for his part of the work, as being a sub-contractor under the joint contract. (*Strobel v. Ochse*, 14 Misc. 522.)

But no matter how many liens are filed, either in the aggregate or for the same piece of work, the owner

¹ Affirmed on this point but reversed on other. *Thomas v. Stewart*, 43 State Rep. 881.

² Reversing same case below, 44 State Rep. 636.

is not required to make double payments. (*Vogel v. Luitweiler*, 52 Hun, 184.) The mere fact that a contractor agrees to pay his sub-contractors more than he is to receive from the owner, does not make the owner liable beyond his contract. (*Regan v. Borst*, 11 Misc. 92.)

But when the owner contracts to pay contractors "the cost of labor and materials," and a percentage thereon, it was decided that sub-contracts were proper and the amounts so paid to sub-contractors were the "cost of labor and materials," notwithstanding that they included the sub-contractor's profits. (*Hamilton v. Coogan*, 7 Misc. 677.) But after service on the owner of a copy of notice of lien filed, he will not be protected in any payment made to contractor or other claimant (section 4, act of 1885; section 11, Lien Law).

The rules and principles applicable to private contracts under this chapter are equally applicable to public contracts.

There is the same absence of privity between the municipality and the sub-contractor, and the latter can only claim under the contractor. Wilful abandonment of the contract by the contractor breaks the contract, and if there be nothing then due and payable to him, there is nothing to which the lien can attach (*McChesney v. City of Syracuse*, 75 Hun, 503); and when the contractor was to be paid 80 % by the city as the work progressed and the remaining 20 % three months after completion, and he abandoned the work after receiving more than the 80 %, and the city contracted with his sureties to complete and paid them the balance, the liens of his workmen were held to be unavailing, for there was nothing due to which they could attach, since the pro-

vision for the retention of the 20 % was solely for the city's benefit. (*Weisemair v. City of Buffalo*, 57 Hun, 48.)

If a city contractor turn over his contract to another to complete, but retain the right to some share of the profit after the terms of the agreement are completed, the liens of his creditors will reach such profit, if there be any, but otherwise not (*Brainard v. Kings County*, 84 Hun, 290); but such assignee or quasi-assignee cannot have a lien on the fund unless he fully performs the contract. (*Mahon v. Guilfoyle*, 18 Supp. 93.)

And when a contractor fails to complete, even after notice of intended forfeiture if he does not go on, the city has the right, not only to do all unfinished work, but also to remedy all defects in work done and deduct all this from contract price. (*Powers v. City of Yonkers*, 114 N. Y. 145.)

So where the city has stipulated that so much of the moneys due to the contractor as shall be considered necessary may be retained by the city, until all suits or claims for damages have been settled, a lienor who has obtained a judgment of foreclosure in his favor must still await the determination of these claims, but these claims can only include those based on the fault or misconduct of the contractor and not from fault in the design or specifications. (*Cranford v. City of Brooklyn*, 13 App. Div. 151.)

(B.) ANY AMOUNT FOR WHICH THE OWNER HAS BECOME
PERSONALLY LIABLE.

The lien upon the owner's interest in the property is based upon the two ideas, that he has promised to pay

a certain sum for the improvements and that he is benefited by the improvements. His promise to pay is found in his original contract with the contractor or in his orders for extra work. If then, after default by contractor, work is continued by sub-contractors on the owner's promise to pay for it, they may have liens and personal judgments against the owner for work done after such promise. (*Hutton Bros. v. Gordon*, 2 Misc. 267.) And if the owner engage some one, say a carpenter, to build a house for him, without making an agreement as to price, a sub-contractor engaged by the carpenter to do a certain portion of the work, who performs his sub-contract with the knowledge of the owner and under the direction of his architect, may have a lien for the full amount of his contract and extra work. (*New v. Carroll*, 56 State Rep. 425.)

If the contract between owner and contractor is greatly to the advantage of the owner, as where the owner retains the fee and makes advances to the builder to pay for sub-contracts, under an agreement to deed the property to builder on completion, subject to mortgage to secure value of land and advances, if the builder dies before completion, the owner will be liable to sub-contractor on his lien for the whole amount due him, even if that exceeds the balance to be advanced under agreement with builder. (*Schmalz v. Mead*, 125 N. Y. 188.)

An oral promise by owner to pay for material to be delivered by sub-contractor, if contractor does not do so, is binding upon him, the consideration on which it is founded being the goods, which are for the benefit of the owner. (*Raabe v. Squier*, 42 N. E. R. 518.)

But although the owner promise to pay the sub-contractor for extra work done by him, this promise cannot

" be enforced against the owner in an action to foreclose a lien filed by sub-contractor in which he claims under the contractor, to whom nothing is due from owner. (*La Pasta v. Weil*, 20 Misc. 555, reversing same case, 20 Misc. 10.)

CHAPTER V.

CONSENT OF THE OWNER.

(A.) EXPRESS CONSENT.

It is distinctly provided in the Lien Law that a lien can only be had by one who performs labor or services or furnishes material "with the consent or at the request of the owner thereof, or his agent, contractor or sub-contractor" (section 3). If the owner participates in the order given by the contractor, which he may do, for example, by enlarging the order given by the contractor, there can be no doubt of his consent, and he becomes personally liable for the payment of the bill. (*Richardson & Boynton Co. v. Reid*, 20 State Rep. 888.) If the "consent of the owner" be given in writing, it cannot be limited by parole (*Hankinson v. Riker*, 10 Misc. 185; rev. *Hankinson v. Vantine*, 152 N. Y. 20); but the consent need not be in writing and materials furnished on verbal consent may be protected by lien. (*Marshall v. Cohen*, 11 Misc. 397.) An agreement to leave improvements on the premises is sufficient consideration for the consent of the owner. (*Hankinson v. Riker*, 10 Misc. 185; rev. *Hankinson v. Vantine*, 152 N. Y. 20.) But if the consent of the owner be definitely withdrawn before sub-contractor begins work, and the sub-contractor, after notice of withdrawal of consent, continues the work, he can have no lien, the consent of the owner being absent. (*Lowry v. Woolsey*, 83 Hun, 257.) And in the face of the

definite notice of withdrawal of consent given by owner to sub-contractor, consent cannot be implied on part of owner from his failure to eject the contractor, for owner was under no duty to eject him or forcibly prevent the work. (*Lowry v. Woolsey*, 83 Hun, 257.)

"It seems that the requirements of this statute as to consent are not met by a mere general agreement to the effect that a third person may, at his own expense, make alterations in a building occupied by him. The statute requires more. It requires that the owner shall expressly consent to the particular alteration made, or that, with knowledge of the particular object for which they are employed, he acquiesces in the means adopted for that purpose." (*Hankinson v. Vantine*, 152 N. Y. 20.)

(B.) IMPLIED CONSENT.

"Consent of the owner" may be implied from the circumstances (*Ottiwell v. Watkins*, 15 Daly, 308); or from the terms of the contract, the circumstances of the transaction and without proof of express consent on his part (*Schmalz v. Mead*, 125 N. Y. 188); and if the owner is a vendor under an executory contract of sale and knows of the improvements being made by the vendee, his consent may be inferred from those circumstances (*Kealey v. Murray*, 40 State Rep. 23; but see section 2, Lien Law, as to who is now the owner under such circumstances); or if, being such vendor, he agrees to make advances to the vendee for building. (*Miller v. Mead*, 127 N. Y. 544.)

A vendee in possession under a contract for the purchase of real property is now under the new Lien Law (section 2) defined to be the "owner." Under the act of 1885, such a person not being the owner, his consent

was not enough. (*Mitchell-Vance Co. v. Daiker*, 46 State Rep. 189.) And under a lien for a "sidewalk," the consent of the owner cannot be inferred from a clause in the lease permitting lessees to repair, for the duty to provide a sidewalk is not primarily on the owner, but on the city, and approval of an act which a party could neither authorize nor permit does not amount to a consent. (*Mosher v. Lewis*, 10 Misc. 373.) But if it appears that the construction of the new "sidewalk" was rendered necessary by the repairs and extensions of the building, as to which the owners had consented in writing, and as to which they had actual knowledge, their consent will be implied. While the duty to maintain a sidewalk is with the municipality, the expense of it is chargeable to the owners of adjoining buildings. (*Mosher v. Lewis*, 14 App. Div. 565.) And if there be no provision in the lease giving permission or right to lessee to erect building, the consent of the owner cannot be implied, even though he be the agent of the lessee company, for since the landlord cannot prevent the erection of the building, his acquiescence will not be construed as consent. (*Havens v. West Side E. L. & P. Co.*, 49 State Rep. 771.) An agreement between landlord and tenant, made independently of the lease, permitting the tenant to make improvements, and making an allowance in rent therefor, is not a "consent" to bind the owner, and is full payment by such owner, when allowance of rent is made. (*Regan v. Borst*, 11 Misc. 92.) When the lease forbids alterations without written assent of landlord and no assent is given, the fact that lease recites a use of the premises for a purpose for which they are then unsuitable, does not imply a "consent" by owner. (*Regan v. Borst*, 11 Misc. 92.)

If the lease provide that the term shall not begin until the landlord has certified in writing that certain conditions have been complied with, no consent on his part can be presumed on which to base a consent to make repairs, and lien filed will reach only the tenant's interest, which in this case was a monthly tenancy pending fulfillment of prerequisite conditions. (*Decker v. Sexton*, 19 Misc. 59.)

The "consent" of the owner must be shown affirmatively in order to charge him; so where owner contracted to sell land and let vendee into possession pending execution of the contract, but as it was not shown that this was done for the purpose of building, and as there was no proof that owner assented to such use of his land or contracted with any one for materials or labor, it was held that no "consent" was shown. (*Rossi v. Mackellar*, 37 State Rep. 503.) And this conclusion is strengthened if the house is built on blocks or posts, and is not affixed to the freehold, and is not so regarded by the parties. (*Moore v. McLaughlin*, 11 App. Div. 477.) While the consent of the owner need not be expressly given, but may be inferred from his conduct and attitude, still the facts must be such as to imply a willingness on his part that the work may proceed; so, where the owner made a contract of sale of the lot for cash and mortgage, but objected to the taking possession by the vendee before the payment of the cash and the giving of the mortgage, materials furnished under such conditions did not give a right to a lien. (*Cowen v. Paddock*, 137 N. Y. 188.)

Actual knowledge on the part of the owner, without dissent, is sometimes enough. (*Berry v. Gavin*, 88 Hun, 1.) As where owner lived within 30 feet of the

new building, saw the whole progress of erection, heard the contract made and drew her check in payment. (*Dennis v. Walsh*, 41 State Rep. 103); but if the owner is a lessor and the lease contains no covenant to repair on his part, mere knowledge or acquiescence on his part in repairs made by tenant is not "consent." (*McCauley v. Hatfield*, 59 State Rep. 552.)

The consent may be given by his agent, and the supervising architect is impliedly the agent of the owner in ordering alterations in contract and extra work, and his consent is sufficient. (*Jackson A. I. Works v. Rouss*, 27 J. & S. 512.) But each laborer or materialman must satisfy himself by inquiry of the sufficiency of the title in the apparent owner, and a contract made with a mere trespasser, who, though in possession of the land, had no title, did not bind the real owner, who subsequently ejected the trespasser. (*Spruck v. McRoberts*, 139 N. Y. 193.)

It is sufficient in drafting lien to give the name of the owner of the fee and the name of the lessee against whom the debt is claimed, and in pleading it is sufficient to allege that owner "consented," without alleging method of consent. (*Ross v. Simon*, 16 Daly, 159.)

CHAPTER VI.

WHO IS THE OWNER.

BESIDES the difficulty of deciding whether the owner has consented or not, it is frequently necessary to determine who the owner is. This may be due to uncertainty arising from the agreement entered into between owner and the person making the improvements, or to the relations existing between the ostensible owner and other persons, or to the effect of a division of the fee of the land, or to legal proceedings pending at the time. Who the owner is, is now defined at length in section two.

It may be that the owner of the lot has agreed to sell the lot, but has not yet given the deed ; in such cases the courts have held that the vendor is still the owner (*Hammond v. Shepard*, 19 State Rep. 848 ; *Miller v. Mead*, 6 N. Y. Supp. 273 ; *Hobby v. Day*, 3 N. Y. Supp. 900 ; *Schmalz v. Mead*, 125 N. Y. 188), and the act of 1885 so declared (section 5), but the new Lien Law reverses this rule and declares the vendee in possession to be the owner (section 2).

A married woman who contracts to sell her land through her husband, and who makes advances on a building contract made by him individually and assigned to her, is the owner, and her interest is bound by liens filed (*Schmalz v. Mead*, 125 N. Y. 188) ; if the husband represents himself to be the owner and makes the con-

tract for building in his own name, when, in fact, his wife is the owner and makes the advance, it should be left for the jury to determine whether the husband was not the wife's agent in making the contract. (*Farmilo v. Stiles*, 52 Hun, 450.)

A life tenant of real estate is an "owner" within the meaning of the act (*Lang v. Everling*, 3 Misc. 530); and under the act of 1885 a purchaser at foreclosure sale did not become an "owner" until the deed was delivered to him and his title did not relate back to the date of his bid (*Robbins v. Arendt*, 4 Misc. 196); and a vendee under an executory contract of sale, but not in possession, who agreed to pay for gas fixtures to be delivered, and who acquired title after delivery of gas-fixtures and before lien filed is not the owner. (*Mitchell-Vance Co. v. Daiker*, 46 State Rep. 189.) This rule, however, is now reversed under the new Lien Law, and the title of such purchaser dates back to the time of sale (section 2).

As public contracts are made direct with the municipality or some department thereof, no question as to who is the owner can arise, unless there be some statutory uncertainty. This is, or was, the case in the matter of the Board of Education in cities, there being doubt as to whether such board was a separate municipal corporation or merely a department of the city government.

In 1887 the Court of Appeals decided that the Board of Education of the City of New York was not a separate corporation but only a part of the city government against which a lien might be filed (*Bell v. The Mayor, etc.*, 105 N. Y. 139); but in 1895 the Supreme Court held that the Board of Education of Brooklyn is a separate municipal corporation (since the passage of chapter 687

of the Laws of 1892) and its chief financial officer is the City Treasurer of Brooklyn, with whom notices of lien must be filed. (*Yellow Pine Co. v. Board of Education*, 15 Misc. 58.) This changes the rule in *Bell v. The Mayor, etc., supra*.

CHAPTER VII.

ACTS OF LIENOR FROM WHICH THE LIEN SPRINGS.

(A.) PERFORMANCE ON HIS PART.

As the lien is simply the security to the contractor for the payment to him of what is due or to become due under his *contract* with the owner, the chief ground of defense against the lien, apart from questions of privity and regularity of proceedings, must be non-performance on the part of the contractor or those in privity with him. And as, in cases of actual performance, the application of moneys available for payment will rarely be refused, it will be found that the adjudications of the courts on the question of what constitutes performance are of a negative character, that is to say, they are chiefly decisions on the validity of the excuses for non-performance set up by the lienors in reply to allegations of non-performance made by the owner.

The refusal of the owner to pay an installment, due and payable under the contract, justifies the contractor in stopping work, and a lien filed for the amount due will be sustained (*Rogers v. McGuire*, 32 State Rep. 1104); or the contractor may charge a *quantum meruit* and file a lien for such amount, on the owner's failure to pay as agreed. (*Hunter v. Walter*, 35 State Rep. 363; *Buckley v. Kimball*, 19 N. Y. Supp. 672.) The unreasonable refusal of the architect to give certificate, after substantial performance by the lienor and the wrongful

refusal of the owner to pay, will not defeat claims of performance on the lienor's part. (*Wright v. Reusens*, 45 State Rep. 183; *Schillinger C. Co. v. Arnott*, 152 N. Y. 584.) When the architect gives certificate to the superior contractor for the same work, it is proof that his refusal is unreasonable. (*Schillinger Cement Co. v. Arnott*, 86 Hun, 182.)

Under a contract making the architect the owner's agent, his certificate is conclusive that final payment is due and cannot be disputed by owner. (*Snaith v. Smith*, 7 Misc. 37.)

But when payments are not definitely fixed but are to be made "as the work progresses," and then to be given only on the written certificate of the architect, the latter must be allowed a reasonable discretion, and he must be allowed to consider not only the work done but the work remaining to be done. (*Kelley v. City of Syracuse*, 63 State Rep. 534.)

Interference by the owner is a good excuse for non-performance by contractor. When the owner calls the contractor a fraud and a swindler, knocks him down, beats him and orders him out of the house, the contractor is justified in abandoning work, and his lien will be sustained. (*Spræssig v. Keutel*, 43 State Rep. 794.)

If the owner gives contractor a notice to proceed under the contract, and it is impossible to do so, because of owner's neglect of other work, it is not non-performance on the lienor's part, because it is the owner who prevents him from going on. (*Highton v. Dessau*, 19 N. Y. Supp. 395.) When the owner prevents completion, contractor may file a lien and recover on a *quantum meruit*. (*Wolf v. Horn*, 12 Misc. 100.)

When a contractor has begun work under a verbal

contract, which is complete except as to times and amounts of payments, which are to be settled in a written contract, the refusal of the owner to put such terms into writing will justify a refusal on part of contractor to continue, and his lien for value of work done to time of stoppage is good. (*Smith v. O'Donnell*, 15 Misc. 98.)

(B.) PERFORMANCE BY THOSE IN PRIVITY WITH HIM.

A sub-contractor, claiming as he must under the chief contractor, must satisfactorily excuse non-performance on the part of the chief contractor as well as on his own part, in order to sustain his lien ; but cessation of work by a sub-contractor, caused by the abandonment of work by the contractor is, not abandonment by the sub-contractor, and the subsequent completion by a sub-contractor, at the request of the owner, acting under the contract, is fulfilment by the sub-contractor. (*Bates v. Trustees of Masonic Hall*, 7 Misc. 609.) And when the owner has elected to complete under contract and charge the expense thereof to contractor, the need of obtaining the architect's certificate is thereby waived, in the case of a lienor whose work was done and lien filed prior to such election on part of owner. (*Campbell v. Coon*, 149 N. Y. 556.)

(C.) SUBSTANTIAL COMPLIANCE.

It is manifestly difficult to provide in the building contract and specifications the manner in which the work shall be done or the nature of the materials to be supplied, in so exact and detailed a way that all minds shall agree in their interpretation of them. Because of this diffi-

culty there has arisen the doctrine of "Substantial Compliance," by which is meant a fair and reasonable compliance on the part of the contractor with both the letter and the spirit of the contract. Just what is substantial compliance must depend very largely on the facts and circumstances of each case, but it has been possible for the courts to deduce some general principles to govern them in applying the rule.

Substantial compliance, then, is enough to sustain the lien (*Nunan v. Doyle*, 28 J. & S. 377), although matters of small amount or value have not been done by the contractor according to the terms of the contract (*Keogh Mfg. Co. v. Eisenberg*, 7 Misc. 79; *D'André v. Zimmerman*, 17 Misc. 357), and the question of substantial compliance is one of fact to be determined from the circumstances by the trial court (*Ansonia Brass and Copper Co. v. Gerlach*, 28 N. Y. Supp. 546); and the question depends on the contractor's good faith; if he has really intended and tried to complete but has failed in some few points, it will be considered substantial compliance. (*Murphy v. Stickley-Simonds Co.*, 82 Hun, 159.)

But if the contractor wilfully abandons the work, substantial compliance with the conditions for another payment is not enough, and if any considerable sum is needed to obtain completion, it will be deemed lack of compliance. (*Van Clief v. Van Vechten*, 130 N. Y. 571.)

As said above, the question turns largely on the point of good faith and intention on the part of the contractor. When the lienor contracted to do all the work in erecting the building, while the owner furnished all the building material, the failure of the owner to furnish more material, when near completion, caused contractor to stop and file a lien. The owner subsequently spent \$75 to

complete, but it was held to be substantial compliance on the part of the lienor and his lien was sustained (*McMechan v. Baker*, 34 State Rep. 535); and where, after the contractors had completed the job, according to their understanding of it, they went with a carpenter to the owner and asked him to point out any defects, which they were ready to make good at once, and he was silent, this was construed to be substantial compliance on their part. (*Dennis v. Walsh*, 41 State Rep. 103.) Where it is apparent that the contractor intended to fulfil his contract and the defects amount to but a small portion of the contract price, a finding of substantial performance is proper, and the contractor may be allowed to recover the contract price, less the amount of such defects. (*Valk v. McKeige*, 43 State Rep. 26; *Horgan v. McKenzie*, 43 State Rep. 131.)

Bad faith, *i. e.*, wilful abandonment or refusal to complete on the part of the contractor, will nullify a claim of substantial compliance. It is not substantial compliance, if the work is wilfully left in an incomplete condition; and with the defects complained of running all through the work, or if the work was to be done in a particular manner, and it has not been so done (*Wollreich v. Fettretch*, 21 State Rep. 56); or if substantial additions to the building must be made to complete it (*Beecher v. Schuback*, 53 State Rep. 74); or if it is necessary for the owner to expend a considerable sum of money to complete some part of the contract. (*Hollister v. Mott*, 132 N. Y. 18.)

CHAPTER VIII.

ACTS OF OWNER WHICH WILL DEFEAT THE LIEN.

(A.) DEATH OR CHANGE OF TITLE.

It has already been shown that the lien is simply security for the contract, that it binds the interest of the owner at the time existing, and only to the extent of the balance unpaid upon the contract; it will be shown subsequently that the lien may be filed at any time after the contract is made, and that the security afforded under the act does not arise until the lien is filed. Hence, it follows that a *bona fide* change of title before lien filed will bring in a new owner, who is under no contract whose interest cannot be bound by a lien, for nothing is due from him. So a change of title destroys the right to lien (*Munger v. Curtis*, 42 Hun, 465); but when the right to a lien has accrued, a conveyance of the property by the owner will not defeat the lien when it is shown that the conveyance was made, not in good faith, but with intent to defraud the person who was entitled to the lien, and the validity of the conveyance may be attacked in the action brought to foreclose the lien. (*N. Y. L. & W. W. Co. v. 73d St. Bldg. Co.*, 5 App. Div. 87.)

A lien against a lessee's interest is lost on a subsequent abandonment of the lease, and the articles against which the lien was claimed, having passed to the landlord on the surrender of the lease, are freed from the

lien (*Chamberlin v. McCarthy*, 36 State Rep. 61), and the assignee of a leasehold, who takes it, in good faith, for value, before a lien is filed, holds it free of any lien subsequently filed for work done. (*Hankinson v. Riker*, 10 Misc. 185.)

Prior to the new Lien Law the right to file a lien terminated on the death of the owner (*Tubridy v. Wright*, 144 N. Y. 519), but it is expressly provided now that this right shall not be affected by the death of the owner before lien filed (section 10).

(B.) PAYMENT IN GOOD FAITH.

It is provided that the lien shall only extend to the balance due under the contract from the owner, and it is further provided that double payments shall not be required (section 4), so when the owner sets up a payment, the fact of which is not disputed, the only question which the lienor can raise is the one of good faith in the payment. When the disputed payment is made in cash, it can generally be easily determined whether it was made in good faith or not ; but when the disputed payment consists of the giving of a note or the repayment of a loan, or an allowance in settlement of accounts, or the question of an application of the payment to one account or the other, the question becomes a difficult one.

The proof of payment must be clear, and it cannot be proved by the private account books and declarations of the owner since deceased (*Schwartz v. Allen*, 24 State Rep. 912), and the mere delivery of a check is not sufficient proof of payment to cut off a lien. (*Collins v. Colney*, 14 State Rep. 444.)

On the question of the sufficiency of a payment made

by the owner after lien filed but before notice has been served on the owner, if the payment be made by the owner to the *contractor*, the presumption is against the owner and the payment will not be allowed him (*Kelly v. Bloomingdale*, 139 N. Y. 343); but if the payment be made by the owner to a *sub-contractor* on an order drawn on him by the contractor, after lien filed but before the owner has notice of it, it is a payment in good faith and will stand. (*Newman v. Levy*, 84 Hun, 478.)

The taking of a promissory note or an agreement to take one, for the amount due, will not cut off the right to a lien, but will merely suspend the enforcement of the lien during the period for which credit is given. (*Keogh Mfg. Co. v. Eisenberg*, 7 Misc. 79; *Donovan v. Frazier*, 15 App. Div. 521); and the notes being due and surrendered at the trial, they do not stand in the way of an enforcement of the lien. (*Bates v. Trustees of Masonic Hall*, 7 Misc. 609). After the note has matured and been dishonored, an action to enforce the lien may be begun, (*Linneman v. Bieber*, 85 Hun, 477.) The mere agreement to accept a note in *payment* does not cut off the right to lien, if the note is not paid when due (*Keogh Mfg. Co. v. Eisenberg*, 7 Misc. 79), and the question whether the note has been accepted in *payment* is one of fact, to be determined on the evidence. (*Linneman v. Bieber*, 85 Hun, 477.)

Adjustments of accounts and applications of payments in a particular way will be permitted, if done in good faith, especially if the question be simply between the owner and contractor. Under a contract to erect one building on two adjoining lots owned by different owners, which contract contained a clause providing for certain pay-

ments, as the work progressed throughout the entire building, the contractor properly applied a payment received from one owner, one-half to each account. (*O'Brien v. McCarthy*, 71 Hun, 427.) So when a contractor, having three separate contracts with the same owner, two of which were completed and on which money was due, filed a lien for the third and then completed that and received a payment from the owner, he properly applied it on the earlier contracts and held the lien as security for the balance due on the third. (*Reynolds v. Patten*, 10 Misc. 155.) An agreement between landlord and tenant, made independently of the lease, permitting tenant to make repairs and making an allowance in rent therefor, is fully paid by such owner, as soon as the allowance in rent is made. (*Regan v. Borst*, 11 Misc. 92); and an owner may deduct from the amount due under the lien a sum advanced by him to the contractor as a personal loan. (*Thomas v. Sahagian*, 43 State Rep. 881.)

When the good faith of the payment is attacked by a sub-contractor, no presumption of payment to an intermediate sub-contractor will be made so as to cut off the right to a lien on the part of the subsequent sub-contractor, but payment must be proved by the owner. (*Vogel v. Luitwieler*, 52 Hun, 184.) Payments, however, made in good faith to contractor cut off the right of a sub-contractor to a lien (*Robbins v. Arendt*, 4 Misc. 196), and a similar payment to a sub-contractor has the same effect on his creditors, and this is not altered by the fact that subsequent payments under the contract may become due to the contractor. (*French v. Bauer*, 134 N. Y. 548.)

(C.) ADVANCE OR COLLUSIVE PAYMENTS.

The act carefully provides that any payment made by the owner for the purpose of avoiding the act or in advance of the terms of payment, shall be unavailing against a lienor, and the owner shall pay this sum over again, or as much as may be necessary, to satisfy the lien or liens (section 7).

The test for such payments is the question of good or bad faith, as established by the facts. An advance payment, not collusive, must be credited to the owner (*Lind v. Braender*, 15 Daly, 370); but payments made by owner, in advance of the terms of contract, cannot be availed of against lienors, who, in such cases, can compel owner to pay a second time (*Banham v. Roberts*, 78 Hun, 246); and after order on owner given and accepted, owner cannot be allowed payments made by him to contractors in advance of maturity, for the assignment *pro tanto*. (*Beardsley v. Cook*, 89 Hun, 151.)

Lienors, who have deferred filing liens because of promise of owner to notify them before making further payments, which promise owner disregarded and paid contractor in full before liens were filed, may recover from owner the amount due at the time they were lulled into a feeling of security and deferred action. (*Rope v. Hess*, 6 State Rep. 710.)

CHAPTER IX.

THE ACTS WHICH WILL DEFEAT THE LIEN OF THE CONTRACTOR.

(A.) NON-PERFORMANCE BY HIMSELF.

THE lien is only security for what is due under the contract ; the contract provides for payment of money by the owner and for labor or materials or both by the contractor. Hence it is a complete answer to a demand for money from the owner, if the owner can reply that the labor or materials have not been furnished as agreed.

If the contractor abandon the contract and thus cause the breach, he can claim no benefit under it (*Wollreich v. Fettretch*, 21 State Rep. 56) ; if it is necessary under the contract to have the architect's certificate to obtain a payment, the absence of this certificate is conclusive, unless there is proof that it is unreasonably withheld. (*Beecher v. Schuback*, 53 State Rep. 74). But where a contractor has begun work under a verbal contract, which is complete except as to times and amounts of payment, which are to be settled in a written contract, the refusal of the owner to put such terms into writing will justify a refusal on the part of the contractor to continue, and his lien for value of work done to time of stoppage is good. (*Smith v. O'Donnell*, 15 Misc. 98.)

(B.) DELAY.

The question of non-performance is usually a simple one, for the breach of contract is apparent ; but a much

more difficult question is that of delay on the part of contractor. It may be said, in general, that time is not of the essence of the contract, unless the owner expressly stipulates for it, which he is at liberty to do. A mere provision that work shall be completed on a certain date and paid for on completion, does not make time of the essence. (*Close v. Clark*, 16 Daly, 91); and where there are any alterations made in the contract by the owner, time is no longer of the essence. (*Close v. Clark*, 16 Daly, 91.)

If failure to complete within the stipulated time is caused by the delay of owner, the contractor's right to lien will not be defeated (*Murphy v. Stickley-Simmonds Co.*, 82 Hun, 159); delay so caused is excusable (*Snaith v. Smith*, 7 Misc. 37; *Carney v. Reilly*, 18 Misc. 11; *Morgan v. Taylor*, 24 State Rep. 60); and where owner's delay in certain particulars makes it impossible to proceed on other lines, a notice from owner to proceed is a nullity. (*Highton v. Dessau*, 19 N. Y. Supp. 395.)

CHAPTER X.

THE ACTS WHICH WILL DEFEAT THE LIEN OF A SUB-CONTRACTOR.

(A.) NON-PERFORMANCE ON HIS PART.

THE same reasoning which applies to non-performance by the contractor will apply to non-performance by a sub-contractor, and non-performance on the latter's part is as effective to defeat his lien as on the part of the former. It is possible, however, for a sub-contractor to be recognized under a contract, which in form is confined to owner and contractor, and if any active duty be laid on such sub-contractor as a condition of payment it must be performed or satisfactorily excused. Thus, where the contract required the production of the architect's certificate to show that the sub-contractor had performed his part of contract, it was unreasonable for architect to refuse certificate on the ground that he had already given to chief contractor a certificate of full performance, and the proof of such unreasonable refusal is sufficient excuse. (*Murdock v. Jones*, 3 App. Div. 221.) A refusal by a sub-contractor to deliver an installment, until former installments have been paid for, is not a breach of contract on his part. (*Raabe v. Squier*, 42 N. E. R. 578.)

(B.) NON-PERFORMANCE BY CHIEF CONTRACTOR.

There is privity of contract only between owner and contractor. The contractor takes upon himself the bur-

den of performance as a condition of payment; if payment is to be made by installments, then he must show performance of all conditions up to each installment; if payment is to be made on completion, then he must show completion. The one who takes a sub-contract under the contractor is not in privity with the owner and can only reach him through the contractor; hence he must bear the same burden of proof of performance (*Van Clief v. Van Vechten*, 130 N. Y. 571; *Beecher v. Schuback*, 53 State Rep. 74); and a sub-contractor, who holds an order from contractor for payment out of last installment due him, which order has been accepted by owner, must, nevertheless, show that contract has been performed and that the owner holds sufficient funds to pay the order (*Beardsley v. Cook*, 143 N. Y. 143); and the fact that a sub-contractor has performed or is ready to perform his sub-contract will not avail to support his lien, if the chief contractor has not performed his part and is not entitled to a payment from owner. (*Hutton Bros. v. Gordon*, 2 Misc. 267.)

The sub-contractor has no right as a *quasi* assignee of the contractor to complete on the latter's abandonment of work and so earn the balance due under the contract to apply on his lien, unless the owner assents. He cannot undo the contractor's default by his offer to complete, and he cannot sustain his lien on a *quantum meruit* to the contractor. (*Collins v. Colney*, 14 State Rep. 444.)

If there is no clause in the contract permitting or requiring the owner to complete in case of contractor's default, completion by the owner in such case does not avail a sub-contractor. (*Hollister v. Mott*, 132 N. Y. 18.) But where the owner has made such election under a contract containing such clause, the need of obtaining

the architect's certificate is thereby waived, in the case of a lienor whose work was done and lien filed prior to such election on part of owner. (*Campbell v. Coon*, 149 N. Y. 556.)

(C.) DISPOSAL BY CONTRACTOR OF BALANCE DUE HIM BY
ASSIGNMENT PRIOR TO FILING LIEN.

Before the amendment of 1896 (*infra*) to the act of 1885 this power of the contractor to dispose of the balance due or to grow due to him under the contract by assignment prior to the filing of liens, was one of the great weaknesses in the act viewed from the standpoint of the materialman and was also a cause of great inconvenience to the owner. It benefited no one but a dishonest contractor, and the amendment was in the right direction but did not avail much to correct the evil complained of.

The benefits of the Lien Law only inure to the sub-contractor or materialman on the actual filing of his lien, and as the filing of a lien almost inevitably precipitates the filing of other liens and the stopping of all credit, the building operation necessarily then comes to a standstill and the various claimants expend their energies in claiming priority or in other endeavors to secure themselves.

This fact, the delicate balance of the commercial side of the operation, tends to the withholding of a lien to the last minute, notwithstanding the doubts and distrust of the sub-contractor or materialman, as to the solvency or good faith of the chief contractor. This forbearance gave the latter a free hand to dispose of the balance due or to become due him under the contract.

No liens being filed and there being no priority be-

tween the sub-contractor and the owner, it was a mere question of debt or money due from owner to contractor, and as such could be freely assigned by contractor. All that was needed was to have the assignment brought to the notice of the owner or accepted by him, and to have it made for a valuable consideration and in good faith.

Such an assignment was a valid transfer, as soon as brought to the notice of the owner and liens filed thereafter bind only the amount remaining due after deducting the part assigned. (*Lauer v. Dunn*, 26 State Rep. 412 ; *Fredericks v. Goodman St. H. Ass'n*, 61 State Rep. 650 ; *Mulligan v. Vreeland*, 88 Hun, 183 ; *Bradley & Currier Co. v. Ward*, 15 App. Div. 386.)

Such an order on owner was an assignment *pro tanto*, and as soon as notice thereof was given to the owner, was beyond the reach of creditors, even though the money be actually paid after lien filed. (*Smith v. Sheltering Arms*, 89 Hun, 70.) An order so drawn on owner was valid, even though part of the money so assigned be for payment of material not used upon the building (*Stevens v. Ogden*, 130 N. Y. 182),¹ and if given to secure an antecedent debt, was valid to the extent of such debt against a subsequent lien. (*Hondorf v. Atwater*, 75 Hun, 369 ; *Mahoney v. McWalters*, 3 App. Div. 248.) If the order on owner be made payable out of the money due under the contract or out of the installment to become due, and the contractor abandoning work, the owner completes under the contract and has balance available sufficient to pay the order, it has to be so applied ahead of subsequent liens. (*Murray v. Nicolino*, 31 N. Y. Supp. 1109 ; *Beardsley v. Cook*, 89 Hun, 151.)

¹ Reversing *Stevens v. Reynolds*, 54 Hun, 419.

But even before the amendment of 1896 to the act of 1885, the courts did what they could to retain the building fund for the payment of sub-contractors and materialmen. So it was held that such an assignment by the contractor of the balance to become due him under the contract, was subject to all the conditions of the contract, and as one of the conditions required the production of a certificate from the county clerk that there were no liens of record, all liens duly filed were ahead of such assignment. (*Bates v. Trustees of Masonic Hall*, 7 Misc. 609 ; affirmed as *Bates v. Salt Spr. Nat. Bank*, 88 Hun, 236.) And where contractor assigned the 20 per cent reserved under contract out of final payment, such assignment was subject to lienors' rights, and expenses of completion by owner under contract must be charged against this reserve and not against amount due for extra work, leaving this latter amount to be reached by the liens. (*Bates v. Trustees of Masonic Hall*, 7 Misc. 609 ; affirmed as *Bates v. Salt Spr. Nat. Bank*, 88 Hun, 236.) And a fraudulent assignment by the contractor of balance due him may be set aside as to lienors. (*Murray v. Gerety*, 25 Abb. N. C. 161.)

As the assignment by the contractor must be brought to the notice of the owner, any act short of that fails to cut off the lienor's right, so when a corporation, being the contractor, began proceedings for a voluntary dissolution and had a receiver appointed therein and the sub-contractor completed his work the next day and filed his lien five days thereafter, the court directed the receiver to pay the amount of the lien, on receiving cash from owner and satisfaction from lienor. (*Matter of Christie Mfg Co.*, 15 Misc. 588.)

A mortgage to contractor's wife having been accepted

by the contractor in final payment, was assigned by the wife to the first lienor to secure the amount of his lien and other debt due him, and it was held that it should be so applied and the balance remaining should then be applied to the payment of the second and third lienors in their order, their liens having been filed after the assignment to the first lienor. (*Mahoney v. McWalters*, 3 App. Div. 248.)

Such were the rules governing assignments by contractor of balance due him prior to the passage of chap. 915 of Laws of 1896 amending section five of the act of 1885. Under that it was provided that no assignment of the contract or money due or to become due under it or any part thereof, or any order on owner, by the contractor or a sub-contractor, shall be valid, unless such assignment or order be filed in the county clerk's office, there to be indexed by him in the lien docket. Thus the amendment introduced two new elements into the act: first, it gave public notice of the assignment or order on the owner, and to that extent it had the same effect as the filing of a notice of lien; and second, it estopped the contractor or sub-contractor giving the order from disputing the amount due, unless for mistake or fraud, which he must prove. While the amendment did not preclude the contractor from assigning the balance due or to become due him in payment of an antecedent debt or a debt rising outside of the building contract, yet the publicity which must attend such an assignment would deter him from such an act, for such withdrawal or attempted withdrawal of the means of paying his sub-contractors out of the job in hand, would mean the instant destruction of his credit and the filing of liens by every one interested.

This amendment of 1896 to the act of 1885 has been retained in all its detail in the new Lien Law (section 15).

The amendment of 1896 applied only to the act of 1885, *i. e.* to liens for the improvement of private property, and was not applicable to liens on public improvements. In the new Lien Law, the same distinction is preserved (section 15), and hence all the old rules and decisions apply to assignments by contractors and sub-contractors of moneys due or to grow due under such contracts. When a sub-contractor gives an order on the contractor, which is accepted by him, it is an equitable assignment and cannot be disputed by the sub-contractor, and a lien filed by him or his creditors must give way to such order. (*Kelley v. City of Syracuse*, 63 State Rep. 534.)

(D.) PAYMENT IN GOOD FAITH.

It has been shown above (p. 49) that a sub-contractor necessarily claims under his chief contractor and is bound by his acts ; hence it follows that if the owner has paid the contractor and the contractor has paid the sub-contractor, all in good faith, the person who has supplied materials to the sub-contractor can have no lien for his claim. (*French v. Bauer*, 134 N. Y. 548.) But a materialman, not having filed a lien, on receiving a payment from the sub-contractor, his debtor, has the right to apply it in satisfaction of a prior debt, and can subsequently file and maintain his lien for the balance due him after satisfaction of the prior debt, if the amount due the sub-contractor is large enough for this purpose. (*Mack v. Colleran*, 136 N. Y. 617 ; reversing same case below, 44 State Rep. 636.)

The acceptance of notes by the materialman does not destroy the right to lien, but merely postpones it. It is not payment if the notes be dishonored, and if the lien be filed on the maturity of the unpaid notes and within ninety days, it is valid. (*Jones v. Moores*, 67 Hun, 109.)

So the acceptance of an assignment of the final payment under the contract by a sub-contractor does not waive his right to lien, when the contract provides that such final payment shall be made only after all liens are paid. (*Moran v. Murray Hill Bank*, 26 J. & S. 199.)

CHAPTER XI.

FOR WHAT A LIEN MAY BE FILED.

THE act of 1885, as originally passed, provided for a lien for the performing of labor or furnishing materials for the erection, alteration or repair of a house or any other structure on real property. The attempt was made in the act to name all possible structures. Various amendments extended the scope of the act to include the draining of swamp lands, the building of fish ponds, the setting out of ornamental trees, the supplying of chandeliers, etc., etc., etc., until a very lengthy list was built up. The new Lien Law endeavors to reduce the mass of words in the former act by introducing definitions, and it also brings into one statute the several lien laws heretofore existing.

It now provides that a contractor, sub-contractor, laborer or materialman, who performs labor or furnishes materials for the improvement of real property . . . shall have a lien . . . (section 3). These words read in conjunction with the definitions given to the words "improvement" and "real property" given in section two of the Lien Law, give as wide, if not wider, scope as was given by the act of 1885.

In general, then, a lien may be filed for any structure or fixture erected on real property, for all structural work for railroads, or for gas or oil wells, or in connection with the operation and use of municipal franchises

in the streets or public places of a city or village. Also for any work done upon real property for its permanent improvement. This appears to take the place of the dredging, draining, filling in, etc., of the act of 1885. Gas and electric chandeliers were specifically named in the act of 1885, and while not so named in the new Lien Law, they are now regarded as so necessary a part of the house, and so widely treated as fixtures that it is clearly the intention so to class them and leave them within the law.

In most instances, the work or materials, for which a lien is desired, come so clearly within the words of the act, that there can be no dispute, but occasionally the subject-matter of the lien lies so close to the border line that judicial interpretation is necessary. Following are the decisions on such points :

Furnishing and erecting a gas-compressor, engine, oil-traps and foundation-plates in a brewery comes within the statute (*Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1); a furnace (*Schwartz v. Allen*, 24 State Rep. 912); terracing and sodding (*Pickett v. Gollner*, 26 State Rep. 691); grading (*Raven v. Smith*, 71 Hun, 197; *Frederick v. Goodman St. H. Assn.*, 61 State Rep. 650); improvements for a specific purpose, when intended to be affixed to the freehold (*Mosher v. Lewis*, 10 Misc. 373).

An architect may have a lien for his plans and services, at agreed price, when he is employed in supervising work; but not so when he merely prepares plans. He may have lien for all his expenses in such work, and is also entitled to interest on all sums found due him. (*Rinn v. Electric Power Co.*, 3 App. Div. 305.)

A "public improvement" is now defined (Lien Law, section 2) to be an improvement upon any real property

belonging to the state or a municipal corporation. When the act of 1878 was first enacted, giving a right to a lien on a city contract, it was made to apply to *any contract* made with a city ; but in 1881 this was limited to apply only to contracts under which work and materials were done or furnished upon *any land*, the title to which was, at the making of the contract, in the city and for the performance of which appropriations had been made by the city (chap. 429 of 1881).

The act of 1878 applied only to incorporated cities ; in 1891 it was broadened to include contracts by any county, town, city or village (chap. 255 of 1891), and in 1892 the words “municipal corporation” were also inserted (chap. 629 of 1892) apparently to meet such cases as contracts with a Board of Education (see *supra*, p. 35).

Under the Consolidation Act a lien can be had only for materials furnished or work done on lands, the title to which is in the city ; hence there can be no lien for coal furnished on contract with the Board of Education. (*Bassler v. Putney*, 21 J. & S. 456.)

CHAPTER XII.

WHEN THE LIEN ARISES.

(A.) ON FILING NOTICE.

IN New York, the rule has been that the lien arises only on the filing of the notice. The act of 1885 expressly provided that this should be the rule, and the courts have interpreted the words according to their plain meaning. The new Lien Law makes no change in this respect (section 3) for public contracts (section 5).

The lien originates with the filing of the notice. (*Munger v. Curtis*, 42 Hun, 465; *Maurer v. Bliss*, 6 State Rep. 224; *McCorkle v. Herrmann*, 117 N. Y. 297.) Anterior to the act of 1885 the laborer or materialman had no preferential right to be paid for his labor or material out of the sum which is due from the owner to the contractor, but stands in the same position as other creditors (*McCorkle v. Herrmann*, 117 N. Y. 297); but a valid lien may be filed before all the work is done or all the materials furnished, provided the contract is thereafter completed. (*Heinlein v. Murphy*, 3 Misc. 47.)

(B.) WITHIN STATUTORY PERIOD.

The notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or within ninety days after the completion of the contract, or the final performance of the work, or the

final furnishing of the materials, dating from the last item of work performed or materials furnished (section 10).

This has not been changed from the act of 1885. No change has been made in the rule for public contracts, which remains thirty days (Lien Law, § 12 ; act of 1878, § 2).

A lien filed more than ninety days after completion is void (*McMahon v. Hodge*, 2 Misc. 234) ; but when the contract called for balance of payment after the machinery "has been erected and has been working satisfactorily for four weeks," it was held that a lien filed within ninety days after delivery of the complete machinery as working satisfactorily but more than ninety days after final delivery of the machinery on the premises, falls within the statute. (*Watts-Campbell Co. v. Yuengling*, 125 N. Y. 1.)

(C.) PRIORITY.

The question of priority arises, first, as between the lien claims and other encumbrances, and second, as between the several lien claims. The act distinctly provides (section 13) that the lien claims shall be preferred as prior claims (first) to any conveyance, judgment or other claim which was not docketed or recorded at the time of filing the notice of lien ; (second) to any advances made on any mortgage or other encumbrance on the premises after the filing of such notice of lien ; and (third) to a lien claim for work not yet performed or materials not yet furnished, when the owner has made a general assignment for benefit of creditors and thereby stopped the work, with the proviso that any lien for work actually performed or materials actually fur-

nished at the time of the general assignment, the notice of which is filed within thirty days after assignment, shall not be affected by the fact of the assignment. The amendment of chap. 915 of Laws of 1896 to the act of 1885, now embodied in section 15 of the new Lien Law, gives to docketed orders on the owner the same effect as a notice of lien duly filed and docketed.

The county clerk is required to enter in the lien docket the date, hour and minute of the filing of the notice of lien in his office (section 10), and "persons standing in equal degree, as co-laborers or various persons furnishing materials, shall have priority according to the date of filing their respective liens" (section 13), provided, however, that "laborers for daily or weekly wages have preference over all other claimants without reference to the date when such workmen or laborers shall have filed their liens" (section 13; § 3414, Code).

When the principal contractor and a sub-contractor file liens for the same work, the sub-contractor is entitled to be paid first out of any money due and payable to the contractor. (*Vogel v. Luitwieler*, 52 Hun, 184; *English v. Lee*, 63 Hun, 572.)

The general rule is that lienors, on filing their notices of lien, take their liens, subject to any rights theretofore acquired by third persons in good faith, from or under the contractor, and that whatever rights such persons may assert against him, or the owner, in or to the debt, whether such rights spring from voluntary arrangements, or contract, or are acquired by operation of law, may also be asserted against persons who, as laborers or materialmen, might have previously filed notices of lien, but omitted to do so (*McCorkle v. Herrmann*, 117 N. Y. 297); but an assignee of a contractor's lien, whose con-

sideration is an antecedent debt, is not a *bona fide* purchaser for value and will be postponed to a subsequent lien of a materialman. (*English v. Lee*, 63 Hun, 572.) And a receiver in supplementary proceedings, begun prior to filing of lien claims, even though the appointment of the receiver be subsequent to the filing of the claims, is a preferred creditor of the fund in the hands of the owner, ahead of the lien creditor. (*McCorkle v. Herrmann*, 117 N. Y. 297.¹) These decisions were prior to the amendment of chap. 915, Laws of 1896, to the act of 1885, which required the docketing of every assignment by the contractor or sub-contractor, of money due or to grow due, in order to give the assignment any validity; which provision is now to be found in section 15 of the Lien Law. Bearing this in mind the above decisions are still applicable. What effect the amendment will have on the question of the title of the receiver in supplementary proceedings is still uncertain, but it will probably result in a reversal of the rule in *McCorkle v. Herrmann*, 117 N. Y. 297, for it is plainly the intent of the amendment to reserve the building fund to the sub-contractors and materialmen and to diminish it only by payments to the contractor as they are earned, or by his voluntary orders on the owner, to which publicity is at once given.

On a foreclosure in justice's court, it does not avail to set up priority of liens filed before the plaintiff's, for the proceeding there is simply an adjudication as between sub-contractor, contractor and owner, without regard to other claimants. (*Sheffield v. Loeffler*, 20 State Rep. 890.)

¹ A prior decision to the contrary (*Deady v. Fink*, 24 State Rep. 734) is thus reversed.

In case of several buildings erected under one contract, and of conflicting liens, each lienor shall have priority upon the particular building or premises where his labor is performed or his materials used (section 13); and in every case in which different liens are asserted against property, the court may adjust and determine the order of different liens (section 3403, Code). The act of 1878 provided for "priority according to the date of the filing of their liens" (section 9). This has been omitted in the revision, for section 13 applies only to *private*, not public, contracts, and now the only provision in the law referring to priority in such matters is to be found in § 3418 of the Code, where the court is given power to render judgment "in such order of priority as the court may determine." This is probably an error of omission by the revisers, and not an intentional change, and it can hardly be doubted that the courts would apply the old rule of priority, even if the matter rested wholly in their discretion.

CHAPTER XIII.

THE NOTICE OF LIEN.

(A.) GENERALLY.

HE who would claim the benefit and protection of the lien law must do it by filing his notice of lien, as prescribed in the statute. On this notice his whole claim for protection hangs ; it is thus an important document, yet it is usually drawn in the greatest haste, in the mad rush for priority, when all sub-contractors and material-men are hastening to file liens, because the action of some one among them, in filing his notice of lien, has destroyed the credit of the contractor in the minds of all connected with the job.

The act prescribes a number of statements which must be made in the notice, and these will be examined in detail in the following pages.

The notice itself must be filed in the clerk's office of the county where the property is situated against which the lien is asserted (section 10), and the clerk must endorse thereon the date, hour and minute of filing (section 10). It is provided (section 15, formerly chap. 915, Laws of 1896) that any assignment of the contract or of any money due or to grow due, or of any part thereof, or any order drawn on the owner by contractor or sub-contractor, must be filed in the same manner as the notice of lien in the office of the clerk of the county, in order to have any validity, and must be docketed by the

county clerk in the "lien docket." If it be an assignment of the contract, or an assignment of the money due or to grow due thereunder, with the assignment must be filed the contract, or a statement containing the substance thereof, or copies of these papers or of the order on the owner (section 15).

The lien may be filed before the work is done, or when partly done (*Ringle v. Wallis Iron Works*, 85 Hun, 279); but the notice of lien cannot be amended (*Maurer v. Bliss*, 6 State Rep. 227).

The notice of lien on account of public improvements is directed to be filed with the head of the department or bureau having charge of such construction and with the financial officer of the municipal corporation, *or other officer or person charged with the custody and disbursements of the corporate funds applicable to the contract under which the claim is made* (section 12). The words in italics are new, and appear to have been inserted to meet the views of the court in *Mechanics' & Traders' Nat. Bank v. Winant*, 123 N. Y. 265, where it was held that, although the sub-contractor has filed his notice of lien with the Comptroller, instead of the Commissioner of Public Works, as provided in the contract, it will not be permitted to the assignee of the contractor (standing in his shoes) to press the technical point against him, for it is presumed that the assignee expected to receive only the balance due the contractor as profit, after all work and materials had been paid for. In this case the Court of Appeals reversed the Supreme Court, which had held that one who attempts to fasten a lien in his own favor on a fund is presumed to know the procedure necessary to attain his end; and that a filing of a notice with the Comptroller, instead of the Commissioner of

Public Works, was insufficient. (*Mech. & Trad. Nat. Bank v. Winant*, 16 State Rep. 902.)

Service of a copy of the notice of lien on department chief is enough (*Kelley v. City of Syracuse*, 63 State Rep. 534); that is to say, there need be only one original notice, which should be filed with the financial officer, and a copy may be served on the department chief.

This addition to the act also tends to relieve the subcontractor from the effects of a mistake in determining who is the "financial officer" of the municipal corporation, with whom to file his notice. There is often a grave question as to such officer. (*Yellow Pine Co. v. Bd. of Educ.*, 15 Misc. 58.) But now the court can relieve from an innocent mistake, when there is any room for doubt on this point.

(B.) FALSITY OF ITS STATEMENTS.

As has been stated, the notice of lien is often necessarily drawn in great haste, and for that reason, as well as for the reason that the act is declared to be remedial and to be construed liberally (see *post*, p. 132), the courts have always endeavored to construe the notice to sustain the lien.

However, a substantial compliance with the requirements of the act is demanded; and an untruthful statement that the work and materials had all been completed and furnished is not a substantial compliance, and such a lien must give way to subsequent liens. (*Foster v. Schneider*, 50 Hun, 151; *Close v. Clark*, 16 Daly, 91; *Brandt v. Verdon*, 44 State Rep. 885; *Hutton Bros. v. Gordon*, 2 Misc. 267; *Ringle v. Wallis Iron Works*, 76 Hun, 449.) But to invalidate the notice, the false state-

ment must be wilfully and intentionally false. (*Ringle v. Wallis Iron Works*, 149 N. Y. 439 ; modifying same case below, 77 Hun, 449.)

A statement that claimant has performed the contract is to be construed liberally, and if there be *substantial* compliance, though not *literal* compliance, it is not a false statement. (*Ringle v. Wallis Iron Works*, 149 N. Y. 439.) So, where plaintiff agreed to do all the work of building and defendant to furnish all the materials, and when near completion defendant failed to supply materials and plaintiff stopped work and filed lien, stating that work was all done, though it cost \$75 to complete, the statement was held to be substantially correct and not in conflict with the rule in *Foster v. Schneider*, 50 Hun, 151. (*McMechan v. Baker*, 34 State Rep. 535.) Where a notice of lien recited four separate contracts held by one contractor and is truthful as to three and untruthful as to the fourth, it was sustained as to the three. (*Brandt v. Verdon*, 44 State Rep. 885.) Where the contractor abandoned work because of refusal of owner to pay for value of work done, stating that "all the work, etc., for which a lien is claimed has been done," etc., it was held to be a truthful statement and a valid lien (*Bulkley v. Kimball*, 19 N. Y. Supp. 672); and where a sub-contractor has performed his contract, except in a few details, which he cannot perform until certain work of others has been done, a statement that the work has all been done, etc., is not untruthful and the lien will stand. (*Mull v. Jones*, 45 State Rep. 643.)

The same rule applies to liens on public improvements. A false statement will invalidate the notice of lien (*Fiske v. Rogers*, 28 J. & S. 418) where the lienor knows it to be false (*Goodrich v. Gillies*, 66 Hun, 422); but

a mistake, innocently made, will not invalidate the lien (*Goodrich v. Gillies*, 82 Hun, 18), and proper allowance may be made. (*Gaskell v. Beard*, 58 Hun, 101.) Though a lien claim more than is proved on the trial, this is not necessarily fatal, for it frequently happens. (*Morgan v. Taylor*, 24 State Rep. 60.)

(C.) A BLANKET LIEN.

Where the contract covers several houses and is entire and not divisible, one lien for all the houses should be filed and the portion claimed against each house stated (*Foster v. Schneider*, 50 Hun, 151); and where four several contracts are held by one person on same building operation, it is proper to include them all in one notice of lien. (*Brandt v. Verdon*, 44 State Rep. 885.)

The new Lien Law contains the following: "If several buildings are erected, altered or repaired, or several pieces or parcels of real property are improved, under one contract, and there are conflicting liens thereon, each lienor shall have priority upon the particular building or premises where his labor is performed or his materials are used" (section 13). This is a new provision, and it would now seem better to specify in the notice of lien the amount claimed against each building or parcel of property.

(D.) AGAINST WHOM CLAIMED.

The act of 1885 declared that the notice of lien must contain the name of the owner, lessee, general assignee or person in possession against whose interest a lien is claimed (section 4); the new Lien Law declares that the notice must contain the name of the owner of the real property against whose interest therein a lien is claimed

and the interest of the owner as far as known to the lienor (section 9). These words, in connection with the definitions in section 2 of the Lien Law show that the requirement is unchanged. Both acts provide that the failure to state the name of the true owner, lessee, general assignee or person in possession, or of the contractor or a mis-description of the owner, shall not impair the validity of the lien (act of 1885, section 4; Lien Law, section 9).

A mistake in the notice of lien in the name of the owner does not impair the lien. (*Walkam v. Henry*, 7 Misc. 532; *Berry v. Gavin*, 88 Hun, 1; *Hankinson v. Riker*, 10 Misc. 185.) The fact that the notice names husband and wife as owners, the wife being the sole owner, does not impair the validity of the lien (*Dennis v. Walsh*, 41 State Rep. 103); and the word "owner" is to be taken in its ordinary sense in a notice of lien. (*Hankinson v. Riker*, 10 Misc. 185.) A notice which claims under a contract with C., who is the vendee under an executory contract of sale with M., "who is the owner of said building and appurtenances, and the lands and premises on which the same stands, subject to said contract," is sufficient to charge the interest of M. as owner; and an allegation of M.'s consent is not necessary. (*Kealey v. Murray*, 40 State Rep. 23.) It is sufficient in drafting lien to give the name of owner of fee and name of lessee against whom the debt is claimed. (*Ross v. Simon*, 16 Daly, 159.)

(E.) SIGNATURE AND VERIFICATION.

There is no provision in the act requiring the signature of the notice of lien, and it need not be signed. (*Moore v. McLaughlin*, 66 Hun, 134.)

The Lien Law now provides that the notice must be verified by the lienor or his agent to the effect that the statements therein contained are true to his knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true (section 9). It will be seen that the verification must now be in the same words as the verification of a pleading. This was not the rule under the act of 1885, which merely requires a statement to the effect "that the statements therein contained are true to the knowledge or information or belief of the person making the same" (section 4).

The point was raised, again and again, that a verification in the words of the statute was insufficient, but the courts uniformly held it to be sufficient (*Schwartz v. Allen*, 24 State Rep. 912; *Moore v. McLaughlin*, 66 Hun, 134; *Staubsandt v. Lennon*, 3 Misc. 90; *Cunningham v. Doyle*, 5 Misc. 219), even though it was insufficient under the Code (*Boyd v. Bassett*, 40 State Rep. 658). All this is now changed and the verification must conform to the Code.

An insufficient verification must, under § 25 of the act (cf. section 22, Lien Law), be treated as an irregularity only, and is to be deemed waived unless objection be taken (*Boyd v. Bassett*, 40 State Rep. 658); but a defective verification to a notice is fatal, and a verification made outside the state must have the county clerk's certificate attached. (*Cream City Furniture Co. v. Squier*, 2 Misc. 438.)

The omission of the name of the affiant from the body of the verification does not invalidate the lien. (*Cunningham v. Doyle*, 5 Misc. 219.)

The act of 1878 required the notice to be verified by the

oath or affirmation of the claimant (section 2), but this has been omitted from the revision (section 12), and now no verification is needed on a notice of lien for a public improvement.

(F.) DESCRIPTION OF PROPERTY.

The Lien Law requires the notice to state the property subject to the lien, with a description thereof, sufficient for identification; and if in a city or village, its location by street and number, if known (section 9).

A description by street and number, without metes and bounds, is "sufficient for identification." (*Walkam v. Henry*, 7 Misc. 532.)

(G.) NATURE AND AMOUNT OF SERVICES.

The act of 1885 required that the notice of lien state "the nature and amount of the labor and services performed or the materials furnished or to be furnished" (section 4).

Under this act a notice which simply stated that it was for "work, labor and services rendered and materials furnished in the erection," etc., was insufficient in that it did not state the "nature and amount of the services." (*Luscher v. Morris*, 18 Abb. N. C. 67.) The notice must state the amount claimed, and judgment cannot be rendered for more than the amount named in the notice. (*Maurer v. Bliss*, 6 State Rep. 224.) A notice which states the contract clearly and the amount claimed under it, and adds that the claimant "performed extra work in and about the building and premises aforesaid and furnished materials therefor," is sufficient. (*Hunter v. Wal-*

ter, 35 State Rep. 363.) Since the act does not require that the notice shall state the entire amount of the work done, or the amount of payments made, when the notice set forth only the balance due but described it as the true price and value of the work, it was held that the statute being remedial, it was sufficient. (*Bryson v. St. Helen*, 79 Hun, 167.)

A material change has been made in this part of the notice of lien by the new Lien Law.

The following words have been cut out of the act of 1885. "The nature and amount of the labor and services performed, or the materials furnished or to be furnished . . . and whether all the work for which the claim is made has been actually performed or furnished, and if not, how much of it" (section 4), and in place thereof appear these words:

"The labor performed or to be performed, or materials furnished or to be furnished and the agreed price or value thereof.

"The amount unpaid to the lienor for such labor or materials.

"The time when the first and last items of work were performed and materials were furnished" (section 9).

The effect of the change will probably be beneficial, for it now definitely points out to the lienor the information which the court requires, instead of leaving it to him to recite in a jumbled statement the "nature and amount of services." The revision also changes the form of the statements to be made in a notice of lien on public improvements (section 12).

The act of 1878 required the notice to state from whom the amount claimed was due; and also to give "the amount of the demand after deducting all just credits

and offsets ;" the "time given ;" and that "the work was done, or materials furnished to said contractor, and were actually performed or used in the execution or completion of said contract with said municipal corporation," etc. ; all of which is now omitted, and it was in these requirements that the greatest difficulties and dangers were encountered by the lienor.

The act of 1878 also required "a statement of the terms, . . . conditions of the contract ;" the revision substitutes for this a requirement that the notice give a general description of the contract pursuant to which such public improvement was constructed.

The revision adds new requirements, viz. : "a description of the public improvement upon which the labor was performed and materials expended" and "the kind of labor performed and materials furnished."

In these changes it conforms to the changes introduced into the notice of lien on private property, and the changes will probably conduce to clearness and uniformity of statement on the part of lienors.

The rule that a variance in the name of the contractor shall not affect the validity of the lien is retained (act of 1878, § 2 ; Lien Law, § 12), but it is now required that if the name of the contractor or the sub-contractor is not known to the lienor, it may be so stated in the notice (section 12).

(H.) OBJECT OF THE NOTICE.

The object of the notice is to give information to the owner so that he may ascertain whether the materials have actually been used ; but a contractor, who has knowledge on the subject, cannot claim to be misled by

a failure of a sub-contractor to state in his notice the nature and character of the materials furnished by him. (*Vogel v. Luitwieler*, 52 Hun, 184.) The object of the service of the notice is to protect the owner from making a payment after notice filed and to prevent payment by him, thus affording a like protection to the lienor. (*La Pasta v. Weil*, 20 Misc. 11.¹)

(I.) SERVICE OF OWNER.

The Lien Law provides that, “*at any time* after filing the notice of lien, the lienor may serve a copy of such notice upon the owner, by delivering the same to him personally, *or if the owner cannot be found, to his agent or attorney*, or by leaving it at his last known place of residence in the city or town in which the real property or some part thereof is situated, with a person of suitable age and discretion, *or by registered letter addressed to his last known place of residence*, or if such owner has no such residence in such city or town, or cannot be found *and he has no agent or attorney*, by affixing a copy thereof conspicuously on such property, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon,” (section 11). The parts in italics are new; the rest of the passage was contained in the act of 1885 (section 4).

There are then five methods of service: 1. Personal service. 2. Service on agent or attorney. 3. Service at residence. 4. Service by registered letter. 5. Service by posting copy. It will be observed, however, that service on agent or attorney is not authorized, unless personal service is impossible. Service at residence may

¹ Reversed on another point, 20 Misc. 555.

be used immediately without any attempt at personal service, and the same is true of service by registered letter; while service by posting copy on the premises can only be used when all the other methods are impossible.

Another change made by the new Lien Law is that it permits the service of the notice of lien on the owner *at any time after filing the notice* instead of *within ten days after filing* as in the act of 1885.

The law further provides that *a failure to serve the notice does not affect the validity of the lien*, but until service of the notice has been made on the owner, the owner, who is without knowledge of the lien, shall be protected in any payment made in good faith to any contractor or other person claiming a lien (section 11).

The part in italics is new, and the courts have heretofore ruled otherwise, holding that the failure to serve a copy of the notice on the owner and contractor was fatal. (*Cream City Furniture Co. v. Squier*, 2 Misc. 438.) And until so served, the owner may pay money to the contractor free of the lien (*Newman v. Levy*, 84 Hun, 478.) But as between contractor and owner the lien is effected when a proper notice is filed, and the failure to serve a copy on the owner does not invalidate it. (*Hamilton v. Coogan*, 7 Misc. 677.)

Since the notice of lien for a public improvement is filed with the agent of the municipal corporation, which corresponds to the "owner" of private property, there can be no need of serving notice on such "owner"; but it must be borne in mind that the filing of a lien for a public improvement is not complete until both the financial officer and the head of the department or bureau have been served. (Lien Law, § 12; act of 1878, § 2.)

CHAPTER XIV.

TERMINATION OF THE LIEN.

THERE are six methods of terminating a lien provided in the act, three on the part of the lienor and three on the part of the owner: the lienor may (1) give a satisfaction of lien (section 18); or (2) neglect to prosecute the lien after notice served on him by owner, as prescribed (section 18 and § 3417 Code); or (3) fail to begin foreclosure within a year after filing his notice of lien (section 18); the owner may (1) deposit with the county clerk before suit begun the exact amount claimed in the notice, with interest to time of deposit (section 19); or (2) deposit, after such suit begun, such amount as the court shall direct (section 19); or (3) give a bond, either before or after suit, in such sum as the court shall direct (section 18).

When a satisfaction of lien is given, it is of course on a voluntary settlement, and there are no adverse or conflicting interests then to be considered. When the lienor deliberately abandons claim, after notice served on him to prosecute, it is voluntary settlement and nothing remains to be considered.

The procedure to obtain such an outcome is very simple and consists of the service of a written notice upon the claimant, by leaving such notice at his last known place of residence, requiring him to commence an action to enforce the lien within a time named, which shall not be

less than 30 days, or to show cause at a special term of any court of record, at a time specified in the notice, why the notice of lien should not be vacated and cancelled of record. If no action shall have been begun, on proof by affidavit of service of the notice, the court may make an order that the claim be vacated and canceled of record (section 3417, Code ; section 24, act of 1885).

(A.) TERMINATION BY EXPIRATION OF TIME.

There remains then to consider the effect of time upon the lien. It is provided that the lien shall lapse, when one year has elapsed from the time of filing the notice of lien, and no action has been commenced either to enforce such claim or order of the court made continuing said lien (section 16, Lien Law ; §§ 24 and 6, act of 1885).

The foreclosure suit may be begun on the last day of year and is so begun if *lis pendens* be filed and summons placed in the hands of the sheriff for service, even though the service be made after the termination of the year. (*Hammond v. Shepard*, 19 State Rep. 848 ; *Gee v. Torrey*, 77 Hun, 23.) But a foreclosure of lien is not deemed to be begun until the principal contractor has been served or the papers put in the hands of the sheriff in good faith (*Neuchatel Asphalt Co. v. The Mayor, etc.*, 9 Misc. 376), and service within the statutory time, on the assignee of the chief contractor, who is joined simply because he claims to be such assignee, is insufficient (*Henry v. Lynch*, 1 N. Y. Supp. 780) ; nor can service on one of two defendants be considered a commencement of the action against the other where no privity is shown between them. (*Moore v. McLaughlin*, 11 App. Div. 477.)

The bringing in of a widow of a party joined, but not served within the year will not revive the action against her. (*Moore v. McLaughlin*, 11 App. Div. 477.)

When an action to foreclose a lien has been begun by one claimant, other claimants who are made defendants need not begin an action or file *lis pendens* within a year. (*McAlister v. Case*, 15 Daly, 299.)

This is also the positive rule laid down in the Lien Law (section 16 ; see also section 6, act of 1885), but it is to be noted that the language of the act is that "if a lienor is made a party defendant in an action to enforce another lien," etc., so that it is open to question whether the joinder of a lien-claimant as party defendant to an action to enforce the lien of a prior *mortgage* is such an action as is meant in the act or whether the act refers only to an action to enforce a *mechanic's lien*. In this uncertainty, it is better therefore to obtain an order of court continuing the lien unless the lienor be joined as a defendant in an action to enforce another mechanic's lien on the same property. Of course, the sale in foreclosure will cut off the lien, but there may be surplus moneys, and in order to make claim to these there should be no question as to the validity of the lien.

The Lien Law brings another element into the rule by providing that the lien of lienor joined as a party defendant is continued, *if the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed* (section 16). So that mere joinder as a party is not enough, unless the *lis pendens* has been properly filed.

When a deposit has been made and lien discharged, the lien runs indefinitely against the funds and there is no time limit. It can only be discharged by action begun to

foreclose, or by notice to begin action given by owner. (*Hafker v. Henry*, 5 App. Div. 258.)

If claimants were not joined as parties defendant in action begun by prior lienors and did not begin their action within the year, the lien is lost and their subsequent joinder as defendants in the suit of the prior lienors does not revive their claim. (*Brandt v. Schmeckenbecker*, 89 Hun, 406.)

The act, however, provides that the lien may be kept alive and continued beyond the year by order of court without suit begun (section 16). Formerly it was held that an order of court, continuing the lien, made under section 6 of the act of 1885 was without limit and ran until modified by subsequent order of the court. (*Bigelow v. Bailey*, 59 Hun, 403.) But the manifest inequity and inconvenience of this led to the amendment of chap. 161 of the Laws of 1895 to that section, which provided that a lien, continued by order of court, runs for one year from its new docketing, but a new order and new docketing may be made in each year (section 16). The same amending act provided that all liens theretofore extended indefinitely by order of court should be cancelled unless the action to foreclose was begun within sixty days.

Now the Lien Law provides that the order continuing the lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order (section 16).

The order continuing the lien may be made in the discretion of the court, without action begun. (*Matter of Gould Coupler Co.*, 79 Hun, 206.) When the lien has been discharged by deposit made, it is unnecessary to obtain an order extending lien beyond the year, because

that provision applies only to the land and not to the fund in lieu of the land. The lien runs indefinitely against the fund. (*Hafker v. Henry*, 5 App. Div. 258.)

A formal order to continue a lien already ripened into judgment is unnecessary (*Wright v. Roberts*, 29 State Rep. 553), and a summary motion to cancel lien and restrain its enforcement is not authorized by the statute. (*Wright v. Roberts*, 29 State Rep. 553.)

(B.) BY DEPOSIT.

Turning now to the discharge of the lien by the action of the owner, discharge by deposit must be examined.

If the deposit be made before suit begun, it must be for the exact amount claimed in the notice with interest to the time of deposit (section 19). After suit begun, there are two ways of making a deposit: *First*, where the owner wishes simply to free his land from the lien, in which case the court, after notice of at least five days to all parties to the action, will fix the amount of the deposit at a sum sufficient to pay any judgment that may be recovered against the property. This appears to assume that the owner has more funds in hand than will suffice to pay the lien and that he is a mere onlooker and stakeholder in the contest between the contractor and a sub-contractor (section 19); *second*, when the owner or contractor is actively contesting the right of the lienor to recover the amount claimed by him, he may offer to deposit in court money or securities in an amount to be named in his notice. If within ten days the offer be accepted in writing, the court may make an order, directing that on the deposit of the money or securities, the lien shall be discharged and the deposit shall

take its place (section 3413, Code). And it is provided that if such offer is of money only, the court, on application and notice to the plaintiff, may make such order, without the acceptance of the offer by the plaintiff (section 3413, Code).

The court has full control over the deposit; hence, after money has been deposited, suit brought and plaintiff has defaulted therein, the court, having granted defendant's request for return of deposit, may, on opening the default, order the return of the deposit. (*Cunningham v. Hatch*, 45 State Rep. 685.)

A deposit of money under section 24 of the act of 1885 (section 19 Lien Law) is not a payment of the lien, but merely a substitution of the money for the house, etc., and this rule is not changed by chap. 300 of 1893, in which act the words "discharged by payment" refer to the discharge by deposit or payment into court. (*Matter of Dean*, 83 Hun, 413.)

An offer to pay money into court under section 19 of the act of 1885 (now section 3413 of the Code) must state that it is "in discharge of the lien," or it will not stop the subsequent costs. (*Hall v. Dennerlein*, 39 State Rep. 67; *Burton v. Rockwell*, 63 Hun, 163.)

It is improper for the court to order the return of a deposit *ex parte*. Notice should be given to all. Where a deposit has been made and the lien on the land discharged, the lien on the fund does not expire by limitation, but only by action begun or notice to begin given by owner, and when the money had been withdrawn on an *ex parte* order, the court may order it to be returned. (*Hafker v. Henry*, 5 App. Div. 258.)

If no action has been begun, such order may be made by any judge of a court of record (section 19).

A fund paid into court to discharge a lien takes the place of the land. (*Deady v. Fink*, 24 State Rep. 734.)

(C.) BY GIVING BOND.

But the owner is not obliged to deposit money to lift the lien from his property, but may give a bond for that purpose. There was nothing in the act of 1885 which said whether the bond should be given before or after suit begun, hence it could be given at any time. The Lien Law now so declares in positive terms (section 18). It must be given by the owner with two or more sufficient sureties, who shall be freeholders. It runs to the clerk of the county where the premises are situated, and must be in such sum as the court shall direct, not less than the amount claimed in the notice. The condition is for payment of any judgment which may be rendered against the property. A copy of the proposed bond, with a notice of the time and place where the sureties will justify, not less than five days distant, must be served on the lienor or his attorney. The sureties must together¹ justify in double the amount of the bond, and after the bond has been approved, the court, or a judge thereof, may make an order discharging the lien (section 18). A surety company may become surety, as now provided (section 18).

The owner need not join in the bond. (*N. Y. Lumber Co. v. Merritt*, 15 Daly, 133.) And the remaining member of a firm, after the retirement of the others, may sign as the party in interest under the act, without the joining of his late partners. (*N. Y. Lumber Co. v. Merritt*, 15 Daly, 133.)

The mere filing of the bond will not discharge the

¹ This is new (section 18).

lien, which can only be done by order of court after bond filed and sureties approved. (*Copley v. Hay*, 16 Daly, 446.) And the filing of a bond to discharge a lien does not reserve the bond as a separate security for that lien, but subsequent lienors may establish their rights to its protection, for the bond stands in lieu of the land. (*Scherrer v. Hopper*, 45 State Rep. 638.)

On an application, in an action to foreclose a lien, to discharge certain liens, the validity of the liens cannot be inquired into, and they can only be discharged by the court on ordering ample security in lieu of the property. A default in appearing on such an application for an order does not waive the right to protection by the court in fixing the amount of security sufficient for the protection of all parties. Purchasers must examine orders discharging liens and ascertain that they are proper. (*Fischer v. Hussey*, 11 Misc. 529.)

The Lien Law (section 20), following the act of 1878 (section 13), provides three ways in which a lienor may discharge his lien on a public improvement and one way in which the contractor may do so.

The lienor may—

1. Give a satisfaction of lien.
2. Fail to enforce his lien by action within the prescribed time—three months.

If the lienor set up his answer properly in an action in which he is properly joined, he need not file *lis pendens* or begin his own action to foreclose within the year. (*Moran v. Murray Hill Bank*, 26 J. & S. 199.)

3. Give a satisfaction of a judgment obtained by him.

The only change in the revision is the substitution of the term “three months” for the former period of “ninety days.”

The contractor may make a deposit in the manner prescribed (Lien Law, § 12 ; act of 1878, § 13, as amended by chap. 682 of 1896), and so discharge the lien. The amount of the deposit must be fixed by a justice of the Supreme Court, and the deposit must remain until the lien is discharged in one of the three ways indicated above.

CHAPTER XV.

PARTIES.

THE lienor or the person to whom he has assigned his lien, or his legal representative, must be the plaintiff in the action brought to enforce or foreclose the lien. (Section 3399, Code ; section 2, Lien Law ; section 17, act of 1885.) Two or more lienors having liens upon the same property or any part thereof may join as plaintiffs. (Section 3402, Code ; section 18, act of 1885.)

The defendants must include :

1. All lienors having liens against the same property or any part thereof.

2. All other persons having subsequent liens or claims against the property, by judgment, mortgage or otherwise. (Section 3402, Code ; section 17, act of 1885.)

The Lien Law adds a new class of defendants thus :

3. All persons appearing by the records in the office of the county clerk or register to be ^{owner} ~~overseers~~ of such property or any part thereof. (Section 3402, Code.) It is not clear what this may mean, and there is no definition of what is meant by "overseers," so that we shall have to await judicial interpretation of this sentence.

Of course, the owner and chief contractor are necessary parties defendant, although they are not so named in this section; and in a like manner, in suit to foreclose a lien on a public improvement, the municipal corporation and the chief contractor must be joined, although not named

in this section. They were so recited in section 7 of the act of 1878.

It will be noticed that while mortgagees, grantees and judgment creditors are only necessary parties defendant when they are subsequent encumbrancers, all lienors, whether prior or subsequent, are necessary parties. The reason, of course, is to enable the court to pass on all lien rights and their relation to subsequent encumbrancers in one action. (Section 3403, Code.) So it is provided that several lienors may join in one action, and that if more than one action is begun, the court in which the first action was brought may, upon the application of any party in any of such actions, or upon its own motion, consolidate all of such actions. (Section 3401, Code ; section 18, act of 1885.) None of these provisions, however, apply to actions in courts not of record. (Sections 17 and 18, act of 1885 ; sections 3401 and 3402, Code.)

All subsequent encumbrancers are necessary parties (*Schillinger C. Co. v. Arnott*, 14 N. Y. Supp. 326) ; prior lienors are proper, if not necessary parties. (*Scherrer v. Hopper*, 45 State Rep. 638.) After bond filed, all lienors, owners and encumbrancers are necessary parties. (*Brandt v. Radley*, 23 N. Y. Supp. 277 ; *Scherrer v. Hopper*, 45 State Rep. 638 ; *Sheffield v. Robinson*, 73 Hun, 173.)

The general assignee of the original contractor may be made a defendant and his rights protected (*Thomas v. Sahagian*, 10 N. Y. Supp. 874 ; affirmed on this point but reversed on other, 43 State Rep. 881) ; and one who claims to be an assignee of the chief contractor may be brought in as a proper, if not necessary, party. (*Hilton Bridge Co. v. Gouverneur R. R. Co.*, 90 Hun, 584.) A sub-contractor, who holds an assignment of part of the sum due his principal, being in turn a sub-contractor, and

who rests upon the assignment, although the drawee refuses to honor it, and who, relying on the assignment, has failed to file a lien, may be brought in as a defendant on motion, so as to determine all the rights involved in one action. (*Williams v. Deutscher Verein*, 14 N. Y. Supp. 368.) But a person to whom a contractor has given an assignment of a part payment to fall due under his contract is not a necessary party to the foreclosure. (*Mulligan v. Vreeland*, 88 Hun, 183.) The last two cases cited were decided before the passage of the amendment of 1896 to the act of 1885, which requires all assignments of money due or orders on the owner to be filed and docketed to have any validity. Now, of course, all holders of such assignments or orders are lien claimants, and as such must be joined as parties.

The court has power to bring in any necessary parties defendant on motion (*Miller v. Youmans*, 13 Misc. 59), even though such party be not especially mentioned in section 17 of act of 1885 (now section 3402, Code), if his presence is necessary to a full determination of the rights and questions involved. (*Williams v. Edison E. L. Co.*, 43 State Rep. 127.)

The defendant owner may move to bring in the receivers of the insolvent corporation, which was the chief contractor, and the assignee to whom it assigned all money to grow due under the contract, for they are proper, if not necessary, parties. (*Hilton Bridge Co. v. R. R. Co.*, 145 N. Y. 390.)

But prior grantors of the assignors of the estate against which a lien is claimed are not proper or necessary parties to a foreclosure of lien, and it matters not whether their conveyances are recorded or not (*Southard v. Moss*, 49 State Rep. 225); and the assignee of a lien,

whose assignment is not docketed is not necessary. (Section 14.)

And the attorneys of an insolvent corporation, which was the chief contractor, who claim a lien for their unpaid services on title deeds, etc., are not proper or necessary parties and should not be brought in. (*Hilton Bridge Co. v. R. R. Co.*, 145 N. Y. 390.)

At first, the Supreme Court thought that sureties on the bond were not necessary parties (*Brandt v. Radley*, 23 N. Y. Supp. 277; *Garland v. Van Rensselaer*, 54 State Rep. 74); and the Court of Appeals has decided that the proper practice is to join the sureties as defendants (*Morton v. Tucker*, 145 N. Y. 245; *Jones v. McKenzie*, 20 Misc. 222); but it is still optional with the plaintiff to do this or to wait until after judgment of foreclosure and then sue the sureties for forfeiture of the bond. (*Ringle v. Matthiessen*, 10 App. Div. 274. *Miller v. McKeon*, 15 App. Div. 133; *Reilly v. Poerschke*, 19 Misc. 612.)

The practice as to parties in actions in courts not of record is different; there the only defendant is the owner (*Jackson v. Bunnell*, 17 Civ. Proc. R. 79; section 3404, Code), and it is not necessary to join other lienors or encumbrancers. (*Egan v. Laemmle*, 5 Misc. 224.)

CHAPTER XVI.

CAUSE OF ACTION AND DEFENSE.

(A.) CAUSE OF ACTION.

ANY lienor who has filed a notice of lien may enforce his claim against the property therein mentioned and against the person or persons, firm or firms, corporation or association, liable for the debt, by an action in a court which has jurisdiction to render a judgment in an action founded on contract, for a sum of money equivalent to the amount of the debt. (Section 3399, Code ; section 7, act of 1885 ; section 23, Lien Law.)

Since the lien is the security only, an action to foreclose a lien may be maintained though there be pending another action between the same parties to recover on the contract (*Raven v. Smith*, 71 Hun, 197) ; and a recovery on a foreclosure of lien is not a bar to an action on the contract. (*Raven v. Smith*, 87 Hun, 90.)

An action of foreclosure on a lien filed for work to be done may be begun as soon as anything is due on the lien, and judgment may be had for as much as is due at the time of trial, the practice following foreclosure of mortgage in that respect. (*Ringle v. Wallis Iron Works*, 85 Hun, 279.)

But after foreclosure suit begun against a sole defendant, it is not possible to substitute another defendant, so where lien was filed against husband and it subsequently appeared that the wife was the owner, it was

necessary to begin new foreclosure against wife. (*Spence v. Griswold*, 7 N. Y. Supp. 145.)

Even though the owner has personally promised to pay sub-contractor for extra work done by him, no cause of action exists against owner under a notice of lien claiming only under the contractor, when it appears that there is nothing due the contractor from the owner. (*La Pasta v. Weil*, 20 Misc. 555; reversing same case, 20 Misc. 10.)

There was some doubt at first as to whether the sureties on a bond given to discharge a lien should be treated as primarily or secondarily liable, and it was held that they were principals in the City Court of Brooklyn, and so should be joined as defendants in the foreclosure suit (*Bulkley v. Moses*, 23 N. Y. Supp. 125); while in the Supreme Court they were held to be secondarily liable and only answerable after judgment had in foreclosure. (*Brandt v. Radley*, 23 N. Y. Supp. 277.) The City Court of Brooklyn then adopted the Supreme Court rule. (*Morton v. O'Keefe*, 64 State Rep. 23.) Now it has been decided by the Court of Appeals that the proper practice is to join the sureties as defendants, and in the complaint, instead of asking judgment for a sale of the premises, to ask relief against the persons executing the bond for the amount that shall be determined to be payable upon the lien, and not by separate action on the bond. (*Morton v. Tucker*, 145 N. Y. 245.)

A sub-contractor, who is under contract to furnish trim of a special design, though he may be ignorant of the time within which the contractor is bound to complete, will be liable for damages therefor to contractor. (*Murdock v. Jones*, 3 App. Div. 221.)

When a sub-contractor, at the request of a surety for

the chief contractor, refrains from filing a lien, on the promise of the surety that he will be paid in full, the sub-contractor has a good cause of action against the surety. (*Alley v. Turck*, 8 App. Div. 50.)

The Lien Law provides security only for work done and materials furnished; hence it cannot cover damages for breach of contract, the remedy for which is an action at law (*Morgan v. Taylor*, 24 State Rep. 60); and no actual damages having been shown and there being an affirmative presumption that there was no damage, there can be no liquidated damages allowed. (*McKee v. Rapp*, 69 State Rep. 291.)

It is not proper to join a prior mortgagee as a party defendant and there is no privity between such a mortgagee and a subsequent lienor, that will enable the lienor to ask to have the mortgagee decreed to pay into court an installment due under the mortgage, so that it may be applied on the lien. (*Alyea v. Citizens' Savings Bank*, 12 App. Div. 574.) In like manner a subsequent lienor cannot set up a breach of contract between owner and the foreclosing mortgagee, when the claim of the mortgagee appears to be all right, for there is no privity between them. (*Price v. Alyea*, 13 App. Div. 184.)

The Lien Law now permits a city contractor to deposit money in the way described and so discharge the lien (section 20). There is nothing, however, to prevent the city from taking a bond from the contractor and paying him in full in disregard of the liens. If, however, the liens are adjudged to be good by the court, the city will have to pay the judgments and may then enforce its bond. (*Mayor, etc., v. Crawford*, 111 N. Y. 638.)

As it is the manifest intention, as well as the positive declaration, of the act to prevent multiplicity of actions,

it is provided that when a claimant is made a party defendant to any action brought to enforce any other lien, such action shall be deemed an action to enforce the lien of such defendant (section 16 ; section 6, act of 1885), and it is directed that the claim shall be set forth by way of answer (section 17 of act of 1885 ; section 3402, Code ; see *post*, p. 99.)

But when a lienor is joined as party defendant in an action to foreclose a prior mortgage, he need not set up his lien affirmatively, but may default so far as answer is concerned and wait for the sale, and then make claim to the surplus moneys (rule 64 of Supreme Court rules), and the question of priority between claimants will then be heard and determined.

Courts not of record which have jurisdiction to render judgment upon the contract, to which the lien is security, may entertain a suit brought to foreclose the lien (section 3399, Code ; section 9, act of 1885).

(For procedure in courts not of record, see sections 9 to 13, act of 1885, and sections 3404—3411, Code, and *post*, p. 103.)

(B.) DEFENSE.

It must be borne in mind always that the lien is security for the debt, and that, though the action be in form to foreclose the lien, the real question to be litigated is the amount due the lienor.

It may be that some act of the lienor has amounted to a waiver of the lien ; thus a submission to an arbitration which has resulted in a money award will bar the right to maintain a lien, and a lien filed pending arbitration is not a revocation of the submission (*N. Y. L. & W. Co. v. Schneider*, 16 State Rep. 698) ; but a judg-

ment on the contract between the parties is not a bar, unless pleaded (*Bryson v. St. Helen*, 79 Hun, 167), and the pendency of another suit to foreclose a lien, in which suit the same parties are parties, is not a bar, but the suits may be consolidated, if desired (*D. G. Burton Co. v. Cowen*, 30 N. Y. Supp. 317); and the failure to get the consent of the Building Department before constructing an oven is no defense to a lien for such construction. (*Duhrkof v. White*, 15 App. Div. 613.)

Counter-claims may be set up, as if in an action on the contract. An owner may thus set up damages for deprivation of use of building or machinery through contractor's inexcusable delay (*Ansonia B. & C. Co. v. Gerlach*, 28 N. Y. Supp. 546); and the owner may offset the debt due him from the contractor in an action to foreclose a lien in favor of contractor, and this right is not affected by the fact that he did not avail himself of it in a suit to foreclose the lien of a sub-contractor, or by the fact that the receiver of contractor, who is a judgment debtor, is the plaintiff (*Frost v. McGinnis*, 22 State Rep. 41). The defendant owner may set up as a counter-claim a judgment in her favor against the plaintiff contractor, and it will be allowed. (*Buckley v. Healey*, 34 State Rep. 630.)

But it is not open to a sub-contractor plaintiff to have the allowance against the owner of a personal claim in favor of the plaintiff which is not mentioned in the pleadings. (*Carney v. Reilly*, 18 Misc. 11.)

If a sub-contractor wishes, as a defense, to set up delay on the part of architect to furnish drawings, he must show a demand for them. (*Murdock v. Jones*, 3 App. Div. 221.) But a counter-claim in tort cannot be interposed (*Marshall v. Cohen*, 11 Misc. 397); and an owner

cannot set up, in this way, expenses incurred in discharging a defective lien or preparing a defense to a "possible action" upon it; and the filing of a lien does not constitute a defense to an action on the contract (*Biershenk v. Stokes*, 46 State Rep. 179). Owners who have prevented completion by contractor cannot set up as a counter-claim expenses incurred after breach. (*Wolf v. Horn*, 12 Misc. 100.) Sureties on a bond, when sued after judgment recovered against the property, cannot set up as a defense that parties other than the person named in their bond have been substituted as owners defendants, for the condition of the bond is to pay any judgment rendered against the property. (*Miller v. Youmans*, 13 Misc. 59.)

When a lienor is a party defendant in an action to foreclose a prior mortgage it is not necessary to set up an affirmative defense, but he may await the sale and make claim to the surplus moneys. (Supreme Court rule 64.)

In a Justice's Court it is not available in a foreclosure of lien to set up as a defense the filing of another lien prior to plaintiff's (*Sheffield v. Loeffler*, 20 State Rep. 890); and it is equally unavailing to set up the pendency of another suit for the foreclosure of a lien against the same property in a court of record. (*Egan v. Laemmle*, 5 Misc. 224.)

A plaintiff in a foreclosure suit will not be permitted to proceed *in forma pauperis*; if he wishes that he should sue in a district court. (*Riggs v. Shannon*, 21 Civ. Proc. Rep. 434.)

A defendant who has not answered cannot participate in the judgment, even though he hold an order from the contractor on the comptroller. (*Neuchatel Asphalt Co. v. Mayor, etc.*, 9 Misc. 376.)

CHAPTER XVII.

PLEADINGS.

(A.) COMPLAINT.

THE provisions of the Code of Civil Procedure relating to actions for the foreclosure of a mortgage upon real property and the sale and distribution of the proceeds thereof apply to actions in a court of record, to enforce mechanics' liens on real property, except as otherwise provided. (Section 3401 of Code; section 8, act of 1885.) The difference is chiefly in the form of the judgment and the method of enforcing it.

No other cause of action can be joined to the one set forth in the notice of lien in a suit to foreclose the lien (*Schillinger C. Co. v. Arnott*, 14 N. Y. Supp. 326); and the complaint must show that the notice of lien was filed in conformity with the act. (*Schillinger C. Co. v. Arnott*, 14 N. Y. Supp. 326.)

Where owner changes order for furnace to one for larger size, the allegation in the complaint that it was furnished "at the special instance and request of contractor" and "with the knowledge, approval and restriction" of owner is sufficient to charge the owner. (*Richardson & Boynton Co. v. Reid*, 20 State Rep. 888.) It is sufficient to allege that the owner "consented" without alleging the method of consent. (*Ross v. Simon*, 16 Daly, 159.)

The plaintiff (lienor) may sue on the contract and allege

in his complaint excuses for non-performance within stipulated time, or sue on a *quantum meruit*. (*Keogh Mfg. Co. v. Eisenberg*, 7 Misc. 79); and if the contract requires the production of the architect's certificate before payment can be demanded, the failure to obtain architect's certificate must be satisfactorily explained in the complaint or the complaint may be dismissed. (*Weekes v. O'Brien*, 141 N. Y. 199.) But in an action on a contract which, by its own terms, extends the time if there is delay by the owner's act, it is not necessary to allege excuses for non-performance within the fixed date. (*Keogh Mfg. Co. v. Eisenberg*, 7 Misc. 79.)

In an action on the bond, after judgment had in foreclosure proceedings, the complaint should show that an order was entered permitting plaintiffs to sue on the bond in their own name. (*Ringle v. Wallis Iron Works*, 16 Misc. 167.¹)

But it is too late on appeal to raise the objection that the bond has not been assigned before action brought. (*D'André v. Zimmerman*, 17 Misc. 357.)

The court is presumed to act on proper proofs; hence it is not necessary to allege that the amount of the bond was fixed by the court before bond was given and approved; the order approving it is enough. (*D'André v. Zimmerman*, 17 Misc. 357.)

It is enough in the complaint to allege that a party defendant *claims* to have an adverse interest to the plaintiff, without reciting the interest, thus following the practice in mortgage foreclosure. (*Hilton Bridge Co. v. R. R. Co.*, 90 Hun, 584.)

¹ The above is in the Supreme Court. *Contra*, see decision of City Court of New York in *Reilly v. Poerschke*, 14 Misc. 466; affirmed 18 Misc. 750 and 19 Misc. 612.

In a court not of record, the complaint must set forth substantially all the facts contained in the notice of lien filed with the clerk of the county and the substance of the contract (section 340±, Code), but it need not allege the existence of indebtedness from owner to contractor, where sub-contractor is plaintiff. (*Keavey v. De Rago*, 20 Misc. 105.)

In a suit to foreclose a lien on a public improvement, the complaint must allege the making of the contract between the original contractor and the city; that the plaintiff, as laborer, mechanic, merchant or trader, performed or furnished materials toward the performance or completion of such contract, and that he has duly filed the notice of lien prescribed by the act; it must also show that the chief contractor has performed his contract, or that there is some money due him thereunder to which the lien may attach. (*Breuchard v. The Mayor, etc.*, 61 Hun, 564; *Paige v. The Mayor, etc.*, 16 N. Y. Supp. 348; *Scerbo v. Smith*, 16 Misc. 102.)

This was the rule under the act of 1878, and it remains the rule to-day, subject only to the necessary changes as to the required recitals (see pp. 73, 74).

(B.) ANSWER.

Every defendant, who is a lienor, shall, by answer in the action, set forth his lien, or he will be deemed to have waived the same, unless it is admitted in the complaint and not controverted by another defendant, and the court may adjust and determine the equities of all the parties to the action and the order of the priority of the different liens and determine all issues raised by defense or counter-claim in the action (section 17, act of 1885; Code, §§ 3402, 3403; section 7, act of 1878).

A defendant in a foreclosure suit must set forth his lien affirmatively if he wishes to stand upon it. An amendment, setting up such a lien, would be setting up a different defense and will not be allowed. (*Hondorf v. Atwater*, 75 Hun, 369.) And if the lienor set up his answer properly in an action in which he is properly joined, he need not file *lis pendens* or begin his own action to foreclose within the ninety days. (*Moran v. Murray Hill Bank*, 26 J. & S. 199.)

A defendant who has not answered cannot participate in the judgment, even though he had an order from the contractor on the comptroller (*Neuchatel Asphalt Co. v. The Mayor, etc.*, 9 Misc. 376); but when a lienor is a party defendant in an action to foreclose a prior mortgage, he need not set up an affirmative defense, but may await the sale and then make claim to the surplus money (Supreme Court rule 64).

The chief contractor cannot demur to the complaint because it does not state the exact sum alleged to be due him from the owner; it is enough if it stated that a larger sum is due than is needed to satisfy plaintiff's lien. This is the rule as to a lienor defendant, but not so with the owner, who may insist on the rule of *Brenchard v. The Mayor, etc.* (*Drennan v. The Mayor, etc.*, 14 Misc. 112; but see *contra*, *Scerbo v. Smith*, 16 Misc. 102.)

In courts not of record, the answer, which must be verified, may contain a general denial of each allegation of the complaint or a special denial of one or more of the material allegations thereof: it may also set forth a legal or equitable defense or counter-claim to the lien or the claim on which it is founded (§ 3406, Code; § 11, act of 1885).

CHAPTER XVIII.

MOTIONS AND PRACTICE.

THE action to enforce a mechanic's lien under the existing act is a combination of a common-law action upon the contract and an equity suit for the foreclosure of the lien, which is merely security for the payment of whatever is due under the contract; hence any motion which can be had on either the common-law side or the equity side of the action is proper. In addition to the actual action to enforce the lien, the Lien Law and the new Code amendments authorize and permit certain applications without suit, such as the notice to commence foreclosure or show cause why the notice of lien should not be cancelled, which the owner is permitted to give to a lienor (section 3417, Code; section 24, act of 1885; section 18, Lien Law); the discharge of the lien by deposit or bond given and approved (section 24, act of 1885; section 18, Lien Law); the discharge of the lien pending suit on deposit of money or securities by owner, after offer made and accepted (section 19, act of 1885; section 3413, Code); the consolidation of suits (section 3401, Code; section 18, act of 1885).

In the notes which follow, no attempt is made at an exhaustive discussion of the subject of motions and practice, but attention is merely directed to such points as have been decided by the courts as directly bearing on procedure in such cases.



MOTIONS AND PRACTICE.

NOTICE FROM OWNER TO BEGIN FORECLOSURE.

The right of the owner to a discharge of the lien for failure to begin an action within the time limited in the notice is not absolute, and on the hearing to show cause, etc., the court will exercise its discretion, and if it appear that the lienor has in good faith attempted to begin foreclosure, the court will not order the discharge of the lien. (*In re Poole*, 38 State Rep. 806.) The service of a summons in a suit by the lienor within thirty days is a sufficient compliance with the order. (*In re Cattaberry v. Knox*, 17 App. Div. 372.)

CONSOLIDATION OF SUITS.

The court of record, in which is begun a foreclosure of lien, may consolidate other suits begun in other courts. The City Court of New York may take to itself in this way a suit begun in the Supreme Court. (*Boyd v. Steward*, 24 N. Y. Supp. 830.) But the order cannot be made to consolidate an action partially tried with one in which issue has just been joined. (*Eckworth v. Egan*, 20 Misc. 508.)

INJUNCTION.

A lien was filed against the interest of lessees, who subsequently abandoned lease and landlord entered into possession. An injunction was granted against landlord to restrain use of boilers, etc. (the subject of the lien). Held improper, the landlord being rightfully in possession if they were fixtures, and if they were not fixtures, they were not lienable, and plaintiffs had no interest in them. (*Chamberlin v. McCarthy*, 36 State Rep. 61.)

The prior lienors foreclosed in District Court and ob-

tained judgment. Subsequent lienors foreclosed in Court of Common Pleas and joined the prior lienors as defendants; they defaulted. Held, that Common Pleas had no jurisdiction to grant injunction restraining prior lienors from enforcing their District Court judgment. If that judgment was improper, subsequent lienors should bring an action to set it aside and seek relief therein. (*Jackson v. Bunnell*, 17 Civ. Pro. 79.)

SALE SUBJECT TO LIEN-CLAIMS.

The right, title and interest of the owner in and to certain fixtures attached to the realty having been sold, *subject to the claim of the lienors*, the latter, whose rights had thus been reserved, have no standing to object to the application of the funds realized by the sale. (*In re West Side Light & Power Co.*, 35 State Rep. 799.)

TO AVOID MULTIPLICITY OF SUITS.

On the voluntary dissolution of a corporation, a temporary receiver was appointed on the 12th; work by a sub-contractor, under the corporation as chief contractor, was finished on the 13th and lien filed on the 18th. Held, that the court, to avoid multiplicity of actions and to give effect to the lien law, would direct receiver to pay the amount of the lien, on receiving money from the owner and a satisfaction piece from the lienor. (*Matter of Christie Mfg. Co.*, 15 Misc. 588.)

TO CURE DEFECTIVE LIEN.

The place where a motion to cure a defective lien should be made is at Special Term on proper papers. (*Morgan v. Taylor*, 24 State Rep. 60.)

TO OPEN DEFAULT.

A motion to open default by owner, more than a year after entry of judgment, will not be granted. (*Holler v. Apa*, 18 N. Y. Supp. 588.)

PREFERRED CAUSE.

Under Rule X. of the Special Rules of Practice in the First Judicial Department (New York County), in an action for the foreclosure of a mechanic's lien, either party may apply to have the case put on the preferred calendar, and the court may so order.

CONTINUANCE OF LIEN.

As to better practice when claimant is a party defendant in an action to foreclose a mortgage, see page 79, *ante*.

STATEMENT OF OBJECT OF ACTION.

It is permissible to serve a notice of object of action and that no claim is made against a defendant as in foreclosure of a mortgage. (Section 17, act of 1885; section 3401, Code; § 7, act of 1878.)

THE FINDINGS.

The findings must state that the work and materials were performed and furnished towards the performance or completion of a contract with the city. It is not enough to find that the chief contractor had a contract with the city and that the sub-contractor furnished materials to him. (*Goodrich v. Gillies*, 62 Hun, 479.)

PRACTICE IN COURTS NOT OF RECORD.

The action in these courts shall be commenced, by per-

sonal service anywhere within the state, of a summons and complaint verified in the same manner as a complaint in a court not of record, upon the owner or other person in interest. (Section 9, act of 1885 ; section 3404, Code.) The form and contents of the summons shall be the same as prescribed by the Code for the commencement of an action in a court not of record (Code, 3404, and see Code, § 2877) ; and the summons must be returnable not less than twelve nor more than twenty days after it is issued. (Section 9, act of 1885 ; section 3404, Code.) Service must be made at least eight days before the return day. Provision is made for service of the summons by publication, when necessary. (Section 10, act of 1885 ; § 3405, Code.) On the return day of the summons, issue must be joined by the filing of a verified answer. (Section 11, act of 1885 ; § 3406, Code.)

If owner default, judgment may be had, on proof of service of summons and complaint or of publication, for the amount claimed with costs. (Section 11, act of 1885 ; § 3406, Code.) Trial must be had as on other issues joined in such courts. (Section 12, act of 1885 ; § 3407, Code.) Execution may be issued which shall direct the officer to sell the right, title and interest of the owner in the premises, upon which the lien set forth in the complaint existed at the time of filing the notice of lien. (Section 11, act of 1885 ; § 3408, Code.) But as to the power to order a sale, see *contra*, *Egan v. Laemme*, 5 Misc. 224. (See *post*, p. 112.)

An appeal may be taken in same manner as in actions on contract in such courts. (Section 13, act of 1885 ; § 3409, Code.)

CHAPTER XIX.

TRIAL.

(A.) JURY TRIAL.

THE act of 1885 declared that the form and manner of instituting and prosecuting to judgment the action to enforce the liens provided for in the act shall be the same as in actions for the foreclosure of mortgages upon real property (section 8), and this is now embodied in § 3401 of the Code. Of course in so far as it conforms to the practice in foreclosing of mortgages, it is in equity and precludes a jury trial, but as has been said above (p. 100), this action is a combination of a common-law action on the contract and an equity suit in foreclosure, and the courts have recognized this by deciding that a jury trial may be had, on demand, to determine the amount due under the contract, while the court will determine all questions of priority and other equitable questions and will direct the form of the judgment.

There has been some conflict of views on this point. In May, 1891, it was first raised in the Supreme Court, and it was then decided that "any party to an action to foreclose a mechanic's lien, brought pursuant to the provisions of the act of 1885, has the undoubted right to have the amount of his claim or lien fixed by the verdict of a jury, and if he demands that right, the court has the power, under § 823, to make an order for the trial

by a jury of the question as to the amount of the lien or claim ; and under § 970 of the Code, any party demanding such rights would be absolutely entitled to such an order. After the amount of said claim or lien had been determined by the jury, the case would, however, have to be sent back to the Special Term, in order that the court, if there were several lienors or claimants, might determine the equities between them, and in any case, in order that the court might direct the entry of a proper judgment." (*Schillinger F. P. C. Co. v. Arnott*, 14 N. Y. Supp. 326 ; aff'd, *Schillinger Cement Co. v. Arnott*, 152 N. Y. 585.) The question next came before the Court of Common Pleas in November, 1891, and it was then held that the act of 1885 is not unconstitutional in that it provides that foreclosure of a mechanic's lien shall follow the procedure of a foreclosure of a mortgage and so cuts off a jury trial. A jury may only be had as a matter of right in two instances, *i. e.* in questions as to value of property and as to damages, which questions rarely arise in such cases. Even then the jury can only decide on issues framed. The court may in its discretion send other issues to a jury. The court criticised and refused to follow *Schillinger Co. v. Arnott*, *supra*. (*Riggs v. Shannon*, 44 State Rep. 365.) In December, 1893, however, the Court of Common Pleas, on the demand of the defendant, framed issues on the counter-claim set up in its answer and sent them to a jury for trial. (*Deeves v. Met. Realty Co.*, 6 Misc. 91 ; *Schillinger C. Co. v. Arnott*, 152 N. Y. 584.) In December, 1894, the N. Y. Superior Court, on the demand of a defendant, who had set up a counter-claim for damages for non-performance of a contract by the plaintiff, framed issues and sent them to a jury (*Bradley & Currier Co. v.*

Herter, 30 N. Y. Supp. 270) ; and in April, 1895, the General Term affirmed the decision in the case of *Schillinger C. Co. v. Arnott*, *supra*, so that the rule appears now to be definitely established.

In courts not of record, trial must be had on the issues joined in the same way as other issues in such courts are tried. (Section 12, act of 1885, and § 3407, Code.)

(B.) REFERENCE.

There is no provision giving a reference of course or of right, hence a reference can only be had under the regular procedure or by consent.

In an action of foreclosure, containing "a long account," which is controverted, an order of reference may be made. (*Deeves v. Met. Realty Co.*, 6 Misc. 91.) And when the trial will involve the examination of a long account, although there are other issues of fact not relating to the account, a compulsory reference may be ordered. (*John Weber Co. v. Hearn*, 7 App. Div. 306.)

CHAPTER XX.

EVIDENCE.

THE general rules of evidence, of course, apply to trial in these cases, and the notes which follow simply call attention to the decisions on points specially applicable to questions arising in lien cases.

EVIDENCE IN CONNECTION WITH THE PLEADINGS.

Under a complaint by a sub-contractor, which alleges an agreement between owner and chief contractor and another contract between chief contractor and plaintiff, it is not permissible to offer to prove a contract between owner and plaintiff direct and rest solely on that, and a dismissal of the complaint was proper (*Riggs v. Chapin*, 27 State Rep. 268), but an allegation in a notice of lien that the owner and contractor made a joint contract, while the proof shows a contract by the owner only, is sufficient to bind the owner. (*Kruger v. Braender*, 3 Misc. 275.)

Under a complaint alleging full performance, under a written contract, it is improper to allow evidence to excuse non-performance (*Morowsky v. Rohrig*, 4 Misc. 167); when the pleadings make the issue one of performance or substantial performance, it is not permissible to offer evidence to excuse non-performance or to show that owner completed as contractor's agent under contract (*Beecher v. Schuback*, 1 App. Div. 359); but when

the answer sets up failure to perform according to contract, it is incompetent to give evidence to show architect's refusal to give certificate, that being a condition precedent to payment in contract. (*Decker v. O'Brien*, 1 App. Div. 81.)

When evidence as to an issue not in the pleadings has been offered without objection, the issue must be deemed accepted and can be determined by the court. *Smith v. O'Donnell*, 15 Misc. 98.

BURDEN OF PROOF ON CLAIMANT.

The burden is on the claimant to substantiate his allegations when controverted. There is no duty on the person against whom the action is brought to prove the non-existence of the alleged facts on which the claim is based. (*Raabe v. Squier*, 5 Misc. 220.) When the owner elects to complete and charge expense to contractor, under clause to that effect in contract, there is no burden on him to show the cost of completion, so as to show that no balance remains available for lienors. (*Beecher v. Schuback*, 1 App. Div. 359.)

INTERPRETATION OF THE CONTRACT.

The claim that an agreement to do "all the plumbing" precludes a claim for extra work, caused by changes in plans and specifications, is untenable. (*Cassidy v. Fontham*, 38 State Rep. 177.) The question whether certain articles are to be furnished under an agreement to do all the work under a certain trade, *e. g.* ranges under the plumbing contract, is to be settled by testimony as to the custom of the trade. (*Cassidy v. Fontham*, 38 State Rep. 177; *Highton v. Dessau*, 19 N. Y. Supp. 395.) When the specifications are vague and indefinite, evidence

as to the custom of the trade is proper. (*Horgan v. McKenzie*, 43 State Rep. 131.)

ESTOPPEL.

A misdescription of the contract price by the contractor does not necessarily estop him or those claiming under him. (*Kennedy v. McKone*, 10 App. Div. 88.)

VALUE OF THE WORK.

Proof of the price or value of the work for which the plaintiffs claim is made when the contract is proved with the price named in it and the value of the extra work is shown. (*Cassidy v. Fontham*, 38 State Rep. 177.) An agreement between the parties on the value of the work may be considered in evidence. (*Cunningham v. Doyle*, 5 Misc. 219.)

PAYMENT NOT PROOF OF VALUE.

The mere fact of payment for work done or materials furnished is not evidence of value on owner's claim for deduction for cost of completion. (*Kennedy v. McKone*, 10 App. Div. 88.)

REFEREE'S FINDINGS.

The findings of a referee as to extra work will not be disputed, even though parts be based solely on the testimony of the claimant. (*Valk v. McKeige*, 43 State Rep. 26.) The findings must be definite and clear; the appellate court will not surmise as to the cost of completion. (*Beecher v. Schuback*, 1 App. Div. 359.)

ADMISSION.

The admission of the owner that he has paid the contractor in advance of the terms of the contract, does not estop the contractor. (*Hilton Bridge Co. v. R. R. Co.*, 145 N. Y. 390.)

CHAPTER XXI.

JUDGMENT.

(A.) AGAINST THE PROPERTY.

BEARING in mind the dual nature of this action, *i. e.* that it is an equitable suit to foreclose the lien and at the same time a common-law action on the contract, let us examine first the judgment to be entered for the foreclosure of the lien.

The lien is against the owner's right, title and interest in the real property and improvements existing at the time of filing the notice of lien (Lien Law, § 4; act of 1885, § 1), therefore judgment, as far as the owner is concerned, must run against that. If the "owner's" interest be less than the fee, the whole fee cannot be reached, only the extent of the "owner's" interest is covered by the judgment of foreclosure. Prior rights are not affected, unless they be right under prior lien-claims, for all lien-claims, both prior and subsequent, must be determined in one foreclosure suit, brought by any lienor, no matter what his rank. (Section 17, act of 1885; section 3402, Code.)

On default, proof should be taken and judgment entered, which should direct the sale of the property affected by the lien. (*Riggs v. Stewart*, 14 State Rep. 695.) An owner who defaults and fails to defend is in danger of having a judgment entered against his property, larger than the balance in his hands, and he cannot open the default on this ground, if his laches be great. (*Holler v. Apa*, 18 N. Y. Supp. 588.)

If a lienor, who has been joined as party defendant in a mortgage foreclosure and has answered setting up his lien, be induced to withdraw his answer on a stipulation that the mortgage foreclosure should not be *res adjudicata* as to him, he may commence an action to foreclose his lien, on proof that the property has been sold and bid in by the mortgagee, without paying off his lien, and the judgment in his foreclosure suit must direct the sale of the houses. (*Belfer v. Ludlow*, 37 State Rep. 704.)

In a court not of record, the judgment in an action of foreclosure must be for the amount due and to the effect that plaintiff has a valid lien therefor, but it cannot direct a sale. A judgment of the District Court of New York City, in excess of its powers, may be modified by the Common Pleas [now the Appellate Term] on appeal by striking out the excess. (*Egan v. Laemmle*, 5 Misc. 224 ; and see *ante*, p. 104, also section 11.)

(B.) AFTER BOND GIVEN OR DEPOSIT MADE.

The bond or the deposit takes the place of the land. (*Matter of Dean*, 83 Hun, 413 ; *Deady v. Fink*, 24 State Rep. 734 ; *Scherrer v. Hopper*, 45 State Rep. 638.) Since this is so, after bond given or deposit made, the action is still, in form, against the property, because to reach the fund or the bond it is necessary to show a valid lien on the land, not merely a claim against the defendant. (*Raven v. Smith*, 76 Hun, 60 ; *Kruger v. Braender*, 3 Misc. 275 ; *Cunningham v. Doyle*, 5 Misc. 219 ; *Copley v. Hay*, 16 Daly, 446.) Unless this is so, no recovery can be had on the bond (*Sheffield v. Robinson*, 73 Hun, 173), but it is better to join the sureties in the same action. (*Morton v. Tucker*, 145 N. Y. 245.)

The court will then direct any judgment consistent with the case (*A. Hall Terra Cotta Co. v. Doyle*, 133 N. Y. 603); but the judgment should not provide for a sale of the premises, but should preserve plaintiff's rights against the sureties (*Bulkley v. Kimball*, 19 N. Y. Supp. 672), and if need be, for personal judgment against the owner. (*Lawson v. Reilly*, 13 Civ. Pro. Rep. 290.)

(C.) AGAINST SURETIES.

At first there was some doubt as to whether the sureties should be joined as defendants in the original action, or whether the lienor must first obtain a judgment in form against the property and then sue on the bond. There are some decisions favoring the latter course (*Heinlein v. Murphy*, 3 Misc. 47; *vide* pp. 89 and 91, *ante*); but it has been authoritatively settled by the Court of Appeals that the proper practice is to join the sureties in the original action, and to take personal judgment against them in the same judgment which determines the plaintiff's rights as in form against the land. (*Morton v. Tucker*, 145 N. Y. 245; *Scherrer v. Hopper*, 45 State Rep. 638.) This rule is laid down so that the court may determine the rights of all in one action.

(D.) PERSONAL JUDGMENT.

As has been repeatedly said, the action to enforce the lien, as provided under the act, is not only an equitable action of foreclosure, but at the same time a common-law action on the contract; hence it follows that personal judgment may be given against any one who is found liable under the contract (section 15, act of 1885; § 3412, Code).

This is the rule where the lienor fails to maintain his

lien, because of some act of the owner, as where plaintiff fails to prove title in alleged owner (*Gillin v. Babcock*, 39 State Rep. 26); or where lien has been cut off by prior foreclosure. (*Crouch v. Moll*, 38 State Rep. 48.) There is one decision to the contrary, but this seems to be quite out of harmony with the letter of the act and the spirit of all other decisions. (*Altieri v. Lyon*, 27 J. & S. 110.)

And it is equally the rule where the lien has been lost by some act of the lienor, as where the plaintiff waived his lien (*Snaith v. Smith*, 7 Misc. 37), or where plaintiff consented to withdrawal of deposit, on defendant's stipulation to be personally liable. (*Schillinger Cement Co. v. Arnott*, 86 Hun, 182.)

When for any reason plaintiff fails to establish lien, he may still have personal judgment against his debtor (*Snaith v. Smith*, 7 Misc. 37); the plaintiff may have personal judgment against his debtor, as well as judgment against the premises, in this respect following a judgment for deficiency in mortgage foreclosure. (*Ringle v. Wallis Iron Works*, 86 Hun, 153.) It is not intended to limit the recovery of personal judgment only to those plaintiffs who failed to establish their liens, but such judgment should be given against those liable in contract. (*Ringle v. Wallis Iron Works*, 86 Hun, 153.) Sub-contractors may have personal judgment against contractor, even if their liens are invalid against owner. (*Hutton Bros. v. Gordon*, 2 Misc. 267; *Stapleton v. Mayer*, 17 Misc. 67.)

The personal liability, however, must be clearly established, and under a building contract made with one of two tenants in common, consent by the other tenant to the work does not make him personally liable. (*Smith v. O'Donnell*, 15 Misc. 98.)

It seems that defendant owner may have affirmative relief against defendant contractor on counter-claim, if the answer has been served on defendant contractor. (*Hutton Bros. v. Gordon*, 2 Misc. 267.)

In courts not of record, the judgment must be against the owner for the amount claimed, if he defaults, or if he defends, for the recovery had after trial (section 11, act of 1885 ; §§ 3406, 3407, Code.)

There was no provision for personal judgment against the contractor under the act of 1878. (*Smith v. Scerbo*, 16 Misc. 102.) Now this remedy is given by section 3400 of the Code.

(E.) GENERALLY.

It is definitely provided that the rights of all parties may be determined (§ 3403, Code ; section 17, act of 1885), and that the court in its judgment shall direct the amount due to sub-contractors and workmen to be paid out of the proceeds of sale in their order of priority ; the judgment must also decide as between conflicting claims of contractors and sub-contractors for the same work, so that but one payment shall be required from the owner (section 20, act of 1885 ; § 3414, Code) ; and if, by the terms of his contract, the owner has stipulated for the delivery of bills, notes or other obligations or securities, or of any other species of property in lieu of money, the judgment may direct that such substitute be delivered or deposited as the court may direct ; and the property affected by the liens can only be directed to be sold in default of the owner to deliver said substitute within such time as may be directed (section 22, act of 1885 ; § 3415, Code).

A several judgment cannot be had in a foreclosure ; so

if the owner defaults judgment cannot be entered against him until after trial of issues joined, for only judgment can be entered which shall determine the rights of all (*Holler v. Apa*, 18 N. Y. Supp. 588); and a motion to open default by owner, more than a year after entry of judgment, will not be granted. (*Holler v. Apa*, 18 N. Y. Supp. 588.)

It seems, however, that an owner may have affirmative relief against defendant contractor on counterclaim, if the answer has been served on the defendant contractor. (*Hutton Bros. v. Gordon*, 2 Misc. 267.)

When a claimant presents a bill for work done, after completion of work, and later presents an itemized and larger bill, his failure to explain the increase, upon foreclosure of his lien, precludes him, and recovery can only be had for the smaller amount. (*Spinrad v. Finelite*, 6 Misc. 259.)

Though the plaintiff fail in his claim, other lienors may have judgment sustaining their liens. (*Morgan v. Taylor*, 24 State Rep. 60.)

In courts not of record, if the owner or other party in interest fails to appear on the return, judgment on default may be had for the amount claimed in the complaint with costs, on proof of due service of summons (section 11, act of 1885; § 3406, Code). In such courts, separate judgments may be had against the parties in default, for the relief asked against them. (*Holler v. Apa*, 18 N. Y. Supp. 588.)

The judgment in a district court must be for the amount due and to the effect that plaintiff has a valid lien, but it cannot direct a sale. (*Egan v. Laemmele*, 5 Misc. 224.)

CHAPTER XXII.

COSTS.

“IF an action is brought to enforce a mechanic’s lien against real property in a court of record, the costs and disbursements shall rest in the discretion of the court, and may be awarded to the prevailing party. The judgment rendered in such an action shall include the amount of such costs and specify to whom and by whom the costs are to be paid. If such action is brought in a court of record, they shall be the same as allowed in civil actions in such court. The expenses incurred in serving the summons by publication may be added to the amount of costs now allowed in such court ” (section 3411, Code).

The act of 1885 (section 14) and the act of 1878 (section 11) contained the same rule, except that the act of 1885 provided that after the owner had offered to deposit money or securities after suit brought, and the offer had been accepted by the lienor, no costs could be had after that point unless the lienor obtained a more favorable judgment (section 19), thus conforming to the practice in an offer of judgment. Now all this is left to the discretion of the court. Since the practice in foreclosure of mechanics’ liens is declared to conform to that of foreclosure of mortgages, it is permissible for the owner to make an offer of judgment under § 738 of the Code, but such offer will not avail the owner to stop costs, etc., unless it provides for personal judgment against him for

the amount named. (*Kennedy v. McKone*, 10 App. Div. 88.)

When the defendant denies everything and asks for the dismissal of the complaint, the plaintiff will be allowed full costs, even though he recover less than he claimed. (*Valk v. McKeige*, 43 State Rep. 26.)

An owner who defaults cannot be made personally liable for costs incurred by the trial of the issues, but if the fund in his hands is sufficient to cover the judgment and costs, then it will be so applied, but this does not include costs on appeal. (*Holler v. Apa*, 18 N. Y. Supp. 588.)

An extra allowance may be had if the case is difficult or extraordinary, as in an equity suit (*Lawson v. Reilly*, 13 Civ. Pro. Rep. 290; *Horgan v. McKenzie*, 43 State Rep. 131), but if no costs are allowed, an extra allowance is unauthorized (*Havens v. West Side E. L. & P. Co.*, 49 State Rep. 771); and the extra allowance should be reckoned upon the recovery, not the claim. (*Carney v. Reilly*, 18 Misc. 11.)

An offer to pay the money into court under § 19 (of the act of 1885, now § 3413, Code) must state that it is "in discharge of the lien," or it will not stop the subsequent costs (*Burton v. Rockwell*, 63 Hun, 163), and defendant may tax his costs incurred after that date. (*Schulte v. Lestershire Boot & Shoe Co.*, 88 Hun, 226.)

In courts not of record, costs are to be given with the judgment (section 11, act of 1885; § 3411, Code).

Costs being in the discretion of the court, a separate bill may be awarded to each defendant, when the plaintiff loses (*McChesney v. City of Syracuse*, 75 Hun, 503); but separate bills of costs against the defendants are unauthorized by the Code. (*Mech. Nat. Bank v. Winant*, 16 State Rep. 902.)

CHAPTER XXIII.

APPEALS.

UNDER the act of 1885, appeals were to be taken in the same manner and form as in actions for the foreclosure of mortgages upon real property (section 8) ; now it is simply provided that the practice shall conform to that in foreclosure of mortgage. (§ 3401, Code.)

Before the recent amendments regulating the practice on appeal to the Court of Appeals, it was held that if the amount involved was less than \$500, such an appeal would not lie and that such an action was not an action affecting the title to real estate. (*Norris v. Nesbit*, 123 N. Y. 650 ; *A. Hall Terra Cotta Co. v. Doyle*, 133 N. Y. 603.)

The matter in controversy on an appeal is the amount due the contractor from the city, and hence an appeal will lie if that be over \$500, notwithstanding the several awards to sub-contractors be less than \$500. (*Powers v. City of Yonkers*, 114 N. Y. 145.)

One who has taken no appeal has no standing in the appellate court, much less to ask for an order to cure his defective lien. (*Morgan v. Taylor*, 24 State Rep. 60.)

When the trial court has discharged the lien of a sub-contractor, a failure on his part to serve notice of appeal on the owner and so make him a party respondent on the appeal, is a waiver of the lien and the appellate court cannot reinstate the lien ; but it is possible to review the

issues between the sub-contractor and the contractor on the contract (*Murdock v. Jones*, 3 App. Div. 221); and where the notice of appeal is served on one defendant only, the determination as to the others cannot be reviewed by the appellate court. (*Stanton v. Gohler*, 16 Misc. 353.) So also a lien, in the notice of which is contained a false statement that all the work and materials have been furnished, etc., which was allowed by the referee, must give way to those subsequent liens which are not defective, but only to the liens of those who appealed from the decision of the referee allowing it. (*Foster v. Schneider*, 50 Hun, 151.) An owner, who is not aggrieved, cannot appeal. (*D'André v. Zimmerman*, 16 Misc. 499.) It is too late on appeal to raise the objection that the bond has not been assigned by the county clerk before suit brought; and an objection to the form of the judgment should be taken by motion, not by appeal. (*D'André v. Zimmerman*, 17 Misc. 357.)

In courts not of record, appeals may be taken from such judgments in the same manner and according to the same provisions provided by statute for appeals from judgments in actions in such courts arising on contract for the recovery of money only. (Section 13, act of 1885; § 3409, Code.)

CHAPTER XXIV.

EXECUTION.

THE act of 1885 contained no directions as to execution to enforce the judgment in a court of record ; but as the judgment must be for a sale of the owner's interest and for personal judgment against those liable on contract, which judgment has all the effect of an ordinary money judgment, it will be seen that the usual rules as to execution applied, without any change from the ordinary practice. There is no direct statement on this point in the new Lien Law or in the Code Amendments, except the provision that the practice shall follow that of foreclosure of mortgage. (§ 3401, Code.)

A judgment creditor is entitled to execution on his judgment, even though there be no specific direction in the judgment that he have execution, in case of non-payment by the city authorities. *Mayor, etc., v. Crawford*, 14 State Rep. 891.

In courts not of record, execution may be issued for the collection of the judgment and costs, the same as on judgments in actions on contract in such courts, except that the execution shall direct the officer to sell the right, title and interest of the owner or other person in interest in the premises, upon which the claim set forth in the complaint was a lien at the time of filing the notice of lien prescribed in the act. (Section 11, act of 1885 ; § 3408, Code.) The courts, however, do not recognize the right of these lower courts to order a sale. (*Egan v. Laemmle*, 5 Misc. 224.)

CHAPTER XXV.

LIS PENDENS.

THE notice of lien binds the property for a period of one year from its filing; after that it lapses, unless an action be commenced and a notice of *lis pendens* filed (section 6, act of 1885; Lien Law, § 16), or an order obtained extending the lien and a new docketing be had. But the neglect to file the notice of pendency of action shall not abate any action which may be pending to enforce the lien, but such action may be prosecuted to judgment against the person or persons, firm or firms, corporations or associations liable for the debt. (Section 6, act of 1885; Lien Law, § 16.)

After bond given or money paid into court, it is unnecessary to file a *lis pendens*. (*Sheffield v. Robinson*, 73 Hun, 173; *Bates v. Trustees of Masonic Hall*, 7 Misc. 609.) A court has power, however, to order the cancellation of the *lis pendens* after bond given and approved, since the action as against the land has abated and this motion need not await the termination of the suit. (*Breen v. Lennon*, 10 App. Div. 36; *contra*, prior decision, *Murray v. Barth*, 30 Abb. N. C. 303); but if the plaintiff unreasonably neglect to proceed with the action, the *lis pendens* may be ordered cancelled and the action dismissed as to the owner. (*Townsend v. Work*, 79 Hun, 381.)

Although, under the Consolidation Act, a *lis pendens*

had to be filed within ninety days after filing the notice of lien and an action be begun, unless the claimant be made a party defendant to an action brought to enforce *another* lien, it was enough if the claimant be joined as a defendant on the foreclosure of a prior mortgage, which was another lien, provided he file his *lis pendens*. (*Danziger v. Simonson*, 116 N. Y. 329.)

The Lien Law has made a change in that it now requires the filing of a *lis pendens* when an action of foreclosure is begun in a court not of record (section 16). This was not the case formerly.

In the foreclosure of a lien on a public improvement, the filing of a *lis pendens* is equally imperative, but it is to be filed with the financial officer of the municipal corporation with whom the notice of lien was filed. (Section 17 ; act of 1878, § 4.)

CHAPTER XXVI.

JURISDICTION OF THE COURTS.

THE act gives jurisdiction to entertain the action to enforce the lien to any court of record in the city or county where the property is situated, which would have jurisdiction to render a judgment in an action founded on contract, for a sum equal to the amount of the lien (section 7, act of 1885). It is now provided that "a mechanic's lien on real property may be enforced against such property, and against a person liable for the debt upon which the lien is founded, by an action by the lienor, his assignee or legal representative, in a court which has jurisdiction in an action founded on contract for a sum of money equivalent to the amount of such debt." (Section 3399, Code.)

(A.) SUPREME COURT.

As this court has original jurisdiction at law and in equity, without limit, there can be no question as to its jurisdiction.

(B.) COUNTY COURTS.

The county court has jurisdiction to foreclose a lien, even though the defendant be a non-resident of the county (*Raven v. Smith*, 148 N. Y. 415), and when a bond given to discharge a lien is larger in amount than the jurisdiction of the court approving it, an action may nevertheless be maintained upon the bond after judg-

ment of foreclosure duly had. (*Sheffield v. Murray*, 84 Hun, 555.)

(C.) CITY COURTS.

The City Court of New York has jurisdiction to foreclose a lien, and everything necessary to complete exercise of the jurisdiction goes with it. So a writ of assistance will be issued to aid the purchaser at foreclosure. (*Connor v. Schaeffel*, 19 Civ. Proc. Rep. 378.)

(D.) COURTS NOT OF RECORD.

Following the rule in courts of record, a court not of record which can entertain an action upon contract equal to the amount of the lien may entertain the action to foreclose the lien (section 9, act of 1885 ; section 3403, Code). The district courts in New York city cannot acquire jurisdiction of an executor or administrator. (*Stanton v. Gohler*, 16 Misc. 383.)

(E.) ALL RIGHTS MAY BE DETERMINED.

It is provided that the court in which the action may be brought may settle and determine the equities of all the parties thereto (section 17, act of 1885 ; section 3404, Code). Hence, a court of general jurisdiction, in a foreclosure of lien, having regularly acquired jurisdiction of the subject-matter and the parties, can proceed to determine the rights of all. (*Alyea v. Citizens' Sav. Bk.*, 12 App. Div. 574.) The default of any of the parties does not render the judgment less binding on them. The judgment is conclusive on all, and cannot be attacked collaterally. The court being one of equity, can make a full determination of the matter. (*Hardwick v. Royal Food Co.*, 78 Hun, 52.) When the claim of the plaintiff

in foreclosure is settled, the suit will be continued between the defendants, so as to adjust their rights. And this, notwithstanding that the defendant lienors have not served copies of their answer on the defendant owner. An irregularity can only be availed of when the person claiming it is in some way injured. (*Wilson v. Niagara City Land Co.*, 79 Hun, 163.)

CHAPTER XXVII.

CONTEMPT OF COURT.

FREQUENTLY it happens that the person who is liable on the contract is pecuniarily worthless, and the only security for the sub-contractor or materialman is in the lien upon the land. When a bond is given or a deposit made to take the place of the land, unless the court can exercise summary control of these substitutes and all persons having to do with them, it might easily happen that injustice could be done and the security be swept away and a mere barren money judgment left.

An owner who gives worthless sureties on a bond to discharge a lien, may be punished for contempt of court ; the fine will be limited to an amount sufficient to indemnify the aggrieved party for the actual loss or injury sustained (section 2284 of the Code) so far as it is in excess of \$250 and costs, and this remedy may be had before final decree in the foreclosure proceeding. (*McAveney v. Brush*, 1 App. Div. 97, modifying 13 Misc. 79.) A surety on a bond given to discharge a lien, who wilfully misrepresents his pecuniary ability, so as to deprive the lienor of his security, is guilty of contempt of court, and will be punished for such. This remedy can be had while other remedies are being pursued. The right to examine proposed sureties is a privilege, not a duty. (*Matter of Hopper*, 9 Misc. 171.)

After a default, the defendant who had made a deposit of money to discharge the lien withdrew the deposit. Thereafter default was opened and defendant ordered to return deposit. Held that refusal could be punished as a contempt. (*Cunningham v. Hatch*, 3 Misc. 101; *Hafker v. Henry*, 5 App. Div. 258.)

CHAPTER XXVIII.

CONSTITUTIONALITY OF THE ACT.

“THERE is no constitutional right to a jury trial in a mechanic’s lien case. The provision in the Constitution of 1846 does not give this right, for at that date the only act in existence was chapter 220 of 1844, affecting only the city of New York, and in which the right to a jury trial extended only to the determination of the amount due. This right still exists.” (*Schillinger F. P. C. & A. Co. v. Arnott*, 14 N. Y. Supp. 326 ; affirmed in General Term, 86 Hun, 182 ; see also *Riggs v. Shannon*, 44 State Rep. 365 ; *Deeves v. Met. Realty Co.*, 6 Misc. 91.)

CHAPTER XXIX.

NATURE OF THE REMEDY PROVIDED.

(A.) IN REM.

THE act provides a specific lien upon a specific thing, *i. e.* the interest of the owner in the property improved; the action to enforce this lien is distinctly, therefore, a proceeding *in rem*.

(B.) IN EQUITY.

But this proceeding, or action of foreclosure, is brought on the equity side of the court, and is declared by the act to be similar to and to be governed by the rules which prevail in mortgage foreclosures. (Section 8, act of 1885; section 3401, Code.)

An action to foreclose a lien is in equity, and the court will do substantial justice between all parties. (*Murphy v. Stickley-Simonds Co.*, 82 Hun, 159.) The rights of parties in mechanic's lien cases and in liens obtained by mortgage are in almost all respects the same. (*Ringle v. Wallis Iron Works*, 85 Hun, 279.)

(C.) CUMULATIVE.

The remedy is cumulative, and the filing of a lien does not preclude the enforcement of the claim in an action for work, labor and services outside the lien claim, if the plaintiff so desires. (*Biershenk v. Stokes*, 46 State Rep. 179.) Plaintiff did work for a club, under

whose charter the trustees were personally liable. Held, that the trustees were personally liable as debtors, but plaintiff could also enforce his lien against the club as the owner of the premises, for he can have both remedies, but only one satisfaction. (*Robinson v. Foy*, 19 N. Y. Supp. 120.) But if a lien creditor bring an action at law on the contract, he must exhaust his remedy at law before he can resort to his equitable remedy in the foreclosure of the lien. (*Barbig v. Kick*, 25 Civ. Proc. Rep. 62.)

CHAPTER XXX.

CONSTRUCTION OF THE ACT.

“THIS act is hereby declared to be a remedial statute and is to be construed liberally to secure the beneficial interests and purposes thereof ; and a substantial compliance with its several provisions shall be sufficient for the validity of the lien or liens hereinbefore provided for, and to give jurisdiction to the courts to enforce the same.” (Section 25, act of 1885 ; Lien Law, section 22.)

The act will be construed liberally in favor of the lienor and strictly against the owner. It is a remedial statute for the benefit of laborers and materialmen. (*Hall v. Dennerlein*, 39 State Rep. 67.) But the courts cannot extend purely statutory rights beyond the terms of the statute by which they are created. (*Stevens v. Ogden*, 130 N. Y. 182.)

MECHANICS' LIEN LAW.

TEXT OF THE ACT.

(The words in *Italics* are new.)

CHAPTER XLIX. OF THE GENERAL LAWS.

THE LIEN LAW.

ARTICLE I.—MECHANICS' LIENS.

- Sec. 1. Short title.
2. Definitions.
3. Mechanics' liens on real property.
4. Extent of lien.
5. Liens under contracts for public improvements.
6. Liens for labor on railroads.
7. Liability of owner for collusive payments, incumbrances and other mortgages.
8. Terms of contract may be demanded.
9. Contents of notice of lien.
10. Filing of notice.
11. Service of copy of notice.
12. Notice of lien on account of public improvements.
13. Priority of lien.
14. Assignment of lien.
15. Assignments of contracts and orders to be filed.
16. Duration of lien.
17. Duration of lien on account of contract for a public improvement.
18. Discharge of lien, generally.
19. Discharge of lien by deposit of money into court.
20. Discharge of lien for public improvement.
21. Building loan contracts.
22. Construction of article.
23. Enforcement of mechanics' liens.
24. Priorities of liens for public improvements.

Section 1. **Short title.**—This chapter shall be known as the lien law.

§ 2. **Definitions.**—The term “lienor,” when used in this chapter, means any person having a lien upon property by virtue of its provisions, *and includes his successor in interest*. The term “real property,” when used in this chapter, includes real estate, lands, tenements and hereditaments, corporeal and incorporeal, fixtures, and all bridges and trestle work, and structures connected therewith, erected for the use of railroads, and all oil or gas wells and structures and fixtures connected therewith, and any lease of oil lands or other right to operate for the production of oil or gas upon such lands, and the right of franchise granted by a municipal corporation for the use of the streets or public places thereof, and all structures placed thereon for the use of such right or franchise. The term “owner,” when so used, includes the owner in fee of real property, or of a less estate therein (p. 35), a lessee for a term of years (p. 12), *a vendee in possession under a contract for the purchase of such real property* (p. 34), and all persons having any right, title or interest in such real property, which may be sold under an execution in pursuance of the provisions of statutes relating to the enforcement of liens of judgment, and all persons having any right or franchise granted by a municipal corporation to use the streets and public places thereof, and any right, title or interest in and to such franchise. *The purchaser of real property at a statutory or judicial sale shall be deemed the owner thereof, from the time of such sale* (p. 35). *If the purchaser at such sale fails to complete the purchase, pursuant to the terms of the sale, all liens created by his consent, after such sale, shall be a lien on any deposit made by him and not on the real property sold.* The term “improvement,” when so used, includes the erec-

tion, alteration or repair of any structure upon, connected with, or *beneath* the surface of, any real property, and any work done upon such property, or materials furnished for its permanent improvement (pp. 1, 2). The term "public improvement," when so used, means an improvement upon any real property belonging to the *state* or a municipal corporation (p. 58). The term "contractor," when so used, means a person who enters into a contract with the owner of real property for the improvement thereof (pp. 1, 3, 6). The term "sub-contractor," when so used, means a person who enters into a contract for the improvement of such real property with a contractor, or with a person who has contracted with or through such contractor, for the performance of his contract or any part thereof (pp. 4-7). The term "laborer," when so used, means any person who performs labor or services upon such improvement. The term "materialman," when so used, means any person, other than a contractor, who furnishes material for such improvement (pp. 4-7).

§ 3. **Mechanic's lien on real property.**—A contractor, sub-contractor, laborer or materialman, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner (pp. 11-13, 34-36) thereof, or of his agent, contractor or sub-contractor, shall have a lien for the principal and interest of the value, or the agreed price, of such a labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this article (p. 60).

§ 4. **Extent of lien.**—Such lien shall extend to the owner's right, title or interest (pp. 11-13) in the real property and improvements, existing at the time of filing

the notice of lien (pp. 13-16). If an owner assigns his interest in such real property by a general assignment for the benefit of creditors, within thirty days prior to such filing, the lien shall extend to the interest thus assigned (p. 11). *If any part of the real property subjected to such lien be removed by the owner or by any other person, at any time before the discharge thereof, such removal shall not affect the rights of the lienor, either in respect to the remaining real property, or the part so removed* (p. 13). If labor is performed for, or materials furnished to, a contractor or sub-contractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon (pp. 17-26). In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided (pp. 17-28).

§ 5. **Liens under contracts for public improvements.**—A person (p. 6) performing labor for or furnishing materials to a contractor, his sub-contractor or legal representative, for the construction of a public improvement pursuant to a contract by such contractor with the state or a municipal corporation (p. 35), shall have a lien for the principal and interest of the value or agreed price of such labor or materials upon the moneys of such corporation applicable to the construction of such improvement to the extent of the amount due or to become due on such contract (pp. 25-26), upon filing a notice of lien as prescribed in this article (p. 60).

§ 6. **Liens for labor on railroads.**—Any person who

shall hereafter perform any labor for a railroad corporation shall have a lien for the value of such labor upon the railroad track, rolling-stock and appurtenances of such railroad corporation and upon the land upon which such railroad track and appurtenances are situated, by filing a notice of such lien in the office of the clerk of any county wherein any part of such railroad is situated, to the extent of the right, title and interest of such corporation in such property, existing at the time of such filing. The provisions of this article relating to the contents, filing and entry of a notice of a mechanic's lien, and the priority and duration thereof, shall apply to such liens. A copy of the notice of such lien shall be personally served upon such corporation within ten days after the filing thereof in the manner prescribed by the code of civil procedure for the service of summons in actions in justices' courts against domestic railroad corporations.

§ 7. **Liability of owner for advance payments, collusive mortgages and incumbrances.**—Any payment by the owner to a contractor upon a contract for the improvement of real property, made prior to the time when, by the terms of the contract, such payment becomes due, for the purpose of avoiding the provisions of this article, shall be of no effect as against the lien of a sub-contractor, laborer or materialman under such contract, created before such payment actually becomes due (p. 46). *A mortgage, lien or incumbrance made by an owner of real property, for the purpose of avoiding the provisions of this article, with the knowledge or privity of the person in whose favor the mortgage, lien or incumbrance is created, shall be void and of no effect as against a claim on account of the improvement of such real property,*

existing at the time of the creation of such mortgage, lien or incumbrance (pp. 15-16).

§ 8. **Terms of contract may be demanded.**—A statement of the terms of a contract pursuant to which an improvement of real property is being made, and of the amount due or to become due thereon, shall be furnished upon demand, by the owner, or his duly authorized agent, to a sub-contractor, laborer or materialman performing labor for or furnishing materials to a contractor, his agent or sub-contractor, under such contract. If, upon such demand, the owner refuses or neglects to furnish such statement or falsely states the terms of such contract or the amount due or to become due thereon, and a sub-contractor, laborer or materialman has not been paid the amount of his claim against a contractor or sub-contractor, under such contract, and a judgment has been obtained and execution issued against such contractor or sub-contractor and returned wholly or partly unsatisfied, the owner shall be liable for the loss sustained by reason of such refusal, neglect or false statement, and the lien of such sub-contractor, laborer or materialman, filed as prescribed in this article, against the real property improved for the labor performed or materials furnished after such demand, shall exist to the same extent and be enforced in the same manner as if such labor and materials had been directly performed for and furnished to such owner (p. 8).

§ 9. **Contents of notice of lien** (pp. 65-76).—The notice of lien (pp. 65-66) shall state :

1. The name and residence of the lienor.
2. The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor (pp. 69-70).

3. The name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials ; *or, if the lienor is a contractor or sub-contractor, the person with whom the contract was made.*

4. The labor performed or to be performed, or materials furnished or to be furnished and the agreed price or value thereof (pp. 72-73).

5. The amount unpaid to the lienor for such labor or materials (pp. 72-73).

6. *The time when the first and last items of work were performed and materials were furnished.*

7. The property subject to the lien, with a description thereof sufficient for identification ; and if in a city or village, its location by street and number, if known (p. 72). A failure to state the name of the true owner or contractor, or a mis-description of the true owner, shall not affect the validity of the lien (pp. 69-70). The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge, *except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true* (pp. 70-72, 65-76).

§ 10. **Filing of notice.**—The notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or within ninety days after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished (pp. 60-61). The notice of lien must be filed in the clerk's office of the county where the property is situated. If such property is situated in two or more counties, the notice of lien shall be filed in the office of the clerk of

each of such counties. The county clerk of each county shall provide and keep a book to be called the "lien docket," which shall be suitably ruled in columns headed "owners," "lienors," "property," "amount," "time of filing," "proceedings had," in each of which he shall enter the particulars of the notice, properly belonging therein. The date, hour and minute of the filing of each notice of lien shall be entered in the proper column. The names of the owners shall be arranged in such book in alphabetical order. *The validity of the lien and the right to file a notice thereof shall not be affected by the death of the owner before notice of the lien is filed* (pp. 42-43).

§ 11. **Service of copy of notice.**—*At any time after filing the notice of lien, the lienor may serve a copy of such notice upon the owner, by delivering the same to him personally, or if the owner cannot be found, to his agent or attorney, or by leaving it at his last known place of residence in the city or town in which the real property or some part thereof is situated, with a person of suitable age and discretion, or by registered letter addressed to his last known place of residence, or, if such owner has no such residence in such city or town, or cannot be found, and he has no agent or attorney, by affixing a copy thereof conspicuously on such property, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon. Until service of the notice has been made, as above provided, an owner, without knowledge of the lien, shall be protected in any payment made in good faith to any contractor or other person claiming a lien. A failure to serve the notice does not otherwise affect the validity of such lien.*

§ 12. **Notice of lien on account of public improvements.**—At any time before the construction of a public

improvement is completed and accepted by the municipal corporation, and within thirty days after such completion and acceptance (p. 61), a person performing work for or furnishing materials to a contractor, his sub-contractor, assignee or legal representative, may file a notice of lien with the head of the department or bureau having charge of such construction and with the financial officer of the municipal corporation, *or other officer or person charged with the custody and disbursements of the corporate funds applicable to the contract under which the claim is made.* The notice shall state the name and residence of the lienor, the name of the contractor or sub-contractor for whom the labor was performed or materials furnished, the amount claimed to be due or to become due, the date when due, *a description of the public improvement upon which the labor was performed and materials expended, the kind of labor performed and materials furnished, and give a general description of the contract pursuant to which such public improvement was constructed.* If the name of the contractor or sub-contractor is not known to the lienor, it may be so stated in the notice (p. 74), and a failure to state correctly the name of the contractor or sub-contractor shall not affect the validity of the lien. The financial officer of the municipal corporation *or other officer or person with whom the notice is filed* (p. 66) shall enter the same in a book provided for that purpose, to be called the "lien book." Such entry shall include the name and residence of the lienor, the name of the contractor *or sub-contractor*, the amount of the lien and date of filing, and a brief designation of the contract under which the lien arose.

§ 13. **Priority of liens.**—A lien for materials furnished or labor performed in the improvement of real property

shall have priority over a conveyance, judgment or other claim against such property not recorded, docketed or filed at the time of filing the notice of such lien (pp. 13-16); over advances made upon any mortgage or other incumbrance thereon after such filing (p. 13); and over the claim of a creditor who has not furnished materials or performed labor upon such property, if such property has been assigned by the owner by a general assignment for the benefit of creditors, within thirty days before the filing of such notice (p. 13). *Such liens shall also have priority over advances made upon a contract by an owner for an improvement of real property which contains an option to the contractor, his successor or assigns to purchase the property, if such advances were made after the time when the labor began or the first item of material was furnished, as stated in the notice of lien (pp. 14-15). If several buildings are erected, altered or repaired, or several pieces or parcels of real property are improved, under one contract, and there are conflicting liens thereon, each lienor shall have priority upon the particular building or premises where his labor is performed or his materials are used (p. 69). Persons standing in equal degrees as co-laborers or materialmen shall have priority (pp. 61-64) according to the date of filing their respective liens; but in all cases laborers for daily or weekly wages shall have preference over all other claimants under this article, without reference to the time when such laborers shall have filed their notices of liens (p. 62).*

§ 14. Assignment of lien.—*A lien, filed as prescribed in this article, may be assigned by a written instrument signed and acknowledged by the lienor, at any time before the discharge thereof. Such assignment shall contain*

the names and places of residence of the assignor and assignee, the amount of the lien and the date of filing the notice of lien, and be filed in the office where the notice of the lien assigned is filed. The facts relating to such an assignment and the name of the assignee shall be entered by the proper officer in the book where the notice of lien is entered and opposite the entry thereof. Unless such assignment is filed, the assignee need not be made a defendant in an action to foreclose a mortgage, lien or other incumbrance. A payment made by the owner of the real property subject to the lien assigned, or by his agent or contractor, or by the contractor of a municipal corporation, to the original lienor, on account of such lien, without notice of such assignment and before the same is filed, shall be valid and of full force and effect. Except as prescribed herein, the validity of an assignment of a lien shall not be affected by a failure to file the same (pp. 7, 88).

§ 15. Assignments of contracts and orders to be filed.
 —No assignment of a contract for the performance of labor or the furnishing of materials for the improvement of real property or of the money or any part thereof due or to become due therefor, nor an order drawn by a contractor or sub-contractor upon the owner of such real property for the payment of such money shall be valid, until the contract or a statement containing the substance thereof, and such assignment or a copy of each or a copy of such order, be filed in the office of the county clerk of the county wherein the real property improved or to be improved is situated, and such contract, assignment or order shall have effect and be enforceable from the time of such filing. Such clerk shall enter the facts relating to such assignment or order in the “lien docket”

or in another book provided by him for such purpose (pp. 51-55).

§ 16. **Duration of lien** (pp. 77 78).—No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien (pp. 78-81), and a notice of the pendency of such action, *whether in a court of record or in a court not of record* (p. 123), is filed with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien ; or unless an order be granted within one year from the filing of such notice by a court of record, continuing such lien, *and such lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order.* No lien shall be continued by such order for more than one year from the granting thereof, but a new order and entry may be made in each successive year (p. 80). If a lienor is made a party defendant in an action to enforce another lien, *and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section,* the lien of such defendant is thereby continued (pp. 79-80). Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person (p. 122).

§ 17. **Duration of lien under contract for a public im-**

provement.—If the lien is for labor done or materials furnished for a public improvement, it shall not continue for a longer period than *three months* (p. 84) from the time of filing the notice of such lien, unless an action is commenced to foreclose such lien within that time, and a notice of the pendency of such action is filed with the financial officer of the municipal corporation, *with whom the notice of lien was filed* (p. 123), or *unless an order be made by a court of record, continuing such lien, and a new docket be made stating such fact. And the Supreme Court of this state, or any justice thereof, or the County Court of the county in which such lien was filed, or the county judge of such county, are hereby authorized to make an order continuing any such lien for a period not exceeding six months, upon the application of a lienor upon such affidavits or evidence as in the opinion of such court or judge shall be deemed sufficient. Nothing in this act contained, however, shall prevent any such court or judge from making a new order continuing such lien in each succeeding six months, if in the discretion of such court or judge the same shall be deemed just and equitable. (As amended by chap. 25 of 1899.)*

§ 18. **Discharge of lien generally** (pp. 77-84.)—A lien other than a lien for labor performed or materials furnished for a public improvement specified in this article, may be discharged as follows:

1. By the certificate of the lienor, duly acknowledged or proved and filed in the office where the notice of lien is filed, stating that the lien is satisfied and may be discharged (p. 77).

2. By failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from the time of filing the notice of lien (pp. 77-81).

3. By order of the court vacating or canceling such lien of record, for neglect of the lienor to prosecute the same, granted pursuant to the Code of Civil Procedure (pp. 77-78).

4. *Either before or after the beginning of an action* (p. 77) by the owner executing an undertaking with two or more suffi-

cient surities, who shall be freeholders, to the clerk of the county where the premises are situated, in such sums as the court or a judge or justice thereof may direct, not less than the amount claimed in the notice of lien conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien (pp. 83-85). The sureties must *together* justify in at least double the sum named in the undertaking. A copy of the undertaking, with notice that the sureties will justify before the court, or a judge or justice thereof, at the time and place therein mentioned, must be served upon the lienor or his attorney, not less than five days before such time. Upon the approval of the undertaking by the court, judge or justice, an order shall be made discharging such lien (p. 83). *The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business shall be equivalent to the execution of said bond or undertaking by two sureties; and such company, if excepted to, shall justify through its officers or attorney, in the manner required by law of fidelity and surety companies. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking.* (p. 83).

§ 19.—Discharge of lien by payment of money into court (pp. 81-82).—A lien specified in this article, other than a lien for performing labor or furnishing materials for a public improvement, may be discharged, at any time before an action is commenced (p. 81) to foreclose such lien, by depositing with the county clerk, in whose office the notice of lien is filed, a sum of money equal to the amount claimed in such notice, with interest to the time of such deposit. After such action is commenced (p. 81) the lien may be discharged by a payment into court of such sum of money, as, in the judgment of the court or a judge or justice thereof, after *at*

least five days' notice to all the parties to the action, will be sufficient to pay any judgment which may be recovered in such action (p. 81). Upon any such payment, the county clerk shall forthwith enter upon the lien docket and against the lien for the discharge of which such moneys were paid, the words "discharged by payment." A deposit of money made as prescribed in this section shall be repaid to the party making the deposit, or his successor, upon the discharge of the liens against the property pursuant to law. All deposits of money made as provided in this section shall be considered as paid into court and shall be subject to the provisions of the Code of Civil Procedure relative to the payment of money into court and the surrender of such money by order of the court. An order for the surrender of such moneys may be made by any court of record having jurisdiction of the parties and of the subject matter of the proceeding for the foreclosure of the lien for the discharge of which such moneys were deposited (p. 82). *If no action is brought in a court of record to enforce such lien, such order may be made by any judge of a court of record* (p. 82).

§ 20. Discharge of lien for public improvement, (p. 84). —A lien against the amount due or to become due a contractor from a municipal corporation for the construction of a public improvement may be discharged as follows:

1. By filing a certificate of the lienor or his successor in interest, duly acknowledged and proved, stating that the lien is discharged (p. 84).

2. By lapse of time, when *three months* have elapsed since filing the notice of lien, and no action has been commenced to enforce the lien (p. 84).

3. By satisfaction of a judgment rendered in an action to enforce the lien (p. 84).

4. By the contractor depositing with the financial officer of the municipal corporation, *or the officer or person with whom the notice of lien is filed*, such a sum of money as is directed by a justice of the supreme court, which shall not be less than

the amount claimed by the lienor, with interest thereon for the term of one year from the time of making such deposit, and such additional amount as the justice deems sufficient to cover all costs and expenses. The amount so deposited shall remain with such financial officer or other officer or person until the lien is discharged as prescribed in subdivisions one, two or three of this section (p. 85).

5. *Either before or after the beginning of an action by a contractor executing an undertaking with two or more sufficient sureties, who shall be freeholders, to the state or municipal corporation with which the notice of lien is filed in such sums as the court or a judge or justice thereof may direct, not less than the amount claimed in the notice of lien conditioned for the payment of any judgment which may be recovered in an action to enforce the lien. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking with notice that the sureties will justify before the court or a judge or justice thereof at the time and place therein mentioned must be served upon the lienor, not less than five days before such time. Upon the approval of the undertaking by the court, judge or justice, an order shall be made discharging such lien. The execution of such undertaking by any fidelity or surety company authorized by the laws of this state to transact business shall be equivalent to the execution of such an undertaking by two sureties, and such undertaking, if excepted to, shall justify through its officers or attorney in the manner required by law of fidelity and surety companies. Any such undertaking may be executed in such undertaking as surety by the hand of its officers or attorney duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of such company, shall be filed with each undertaking. Except as otherwise provided herein the provisions of article five of title six of chapter eight of the Code of Civil Procedure are applicable to an undertaking given for the discharge of a lien on account of public improvements. (As amended by chap. 169 of 1898, sec. 1.)*

§ 21. Building loan contract.—*A contract for a building loan, either with or without the sale of land, and any modification thereof, must be in writing, and duly acknowledged, and within ten days after its execution be filed in the office of the clerk of the county in which any part of the land is situated, and the same shall not be filed in the register's office of any county. If not so filed, the interest of each party to such contract in the real property affected thereby is subject to the lien and claim of a person who shall thereafter file a notice of lien under this chapter. A modification of such contract shall not affect or impair the right or interest of a person, who, previous to the filing of such modification, had furnished or contracted to furnish materials, or had performed or contracted to perform labor for the improvement of real property, but such a right or interest shall be determined by the original contract. The county clerk is entitled to a fee of twenty cents for filing such a contract or modification. Such contracts and modifications thereof shall be indexed in a book provided for that purpose, in the alphabetical order of the names of the persons (pp. 8-9) to whom such loans shall be made. (As amended by chap. 78 of 1900.)*

§ 22. Construction of article.—This article is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same (p. 132).

§ 23. Enforcement of mechanics' liens.—The mechanics' liens specified in this article may be enforced against the property (pp. 111-112) specified in the notice of lien and which is subject thereto and against any person liable for the debt upon which the lien is founded (pp. 113-115). The Code of Civil Procedure regulates and provides for such enforcement.

§ 24. Priorities of liens for public improvements.—*Persons having liens under contracts for public improvements*

standing in equal degrees as co-laborers or materialmen, shall have priority according to the date of filing their respective liens; but in all cases laborers for daily or weekly wages shall have preference over all other lienors having liens arising under the same contracts pursuant to this article, without reference to the time when such laborers shall have filed their notice of lien. (Added by chap. 169 of 1898, sec. 2.)

SCHEDULE OF LAWS REPEALED.

1870.	529	All.....	Liens on railroad bridges and trestle work.
1872.	669	All.....	Liens on wharves, piers, bulkheads, etc.
1875.	392	1, 2, 5, 6, 7....	Liens for labor on railroads.
1878.	315	1, 2, 3, 4, 5, 13, 14, 15.....	Liens for public improvements.
1880.	440	1, 2, 3, 4, 10, 13	Liens on oil and gas wells.
1885.	342	1, 2, 3, 4, 5, 6, 24, 25.....	Mechanics' liens generally.
1886.	382	All.....	Validity of notices filed prior to June 27, 1885.
1888.	316	All.....	Amends L. 1885, ch. 342, s. 1.
1891.	255	1, 2, 3, 4, 5, 10, 11, 12, 13...	Amends L. 1878, ch. 315.
1892.	629	1, 2, 3, 4, 5, 10, 11, 12.....	Amends L. 1878, ch. 315.
1893.	300	All.....	Amends L. 1885, ch. 342, sec. 24.
1895.	161	All.....	Amends L. 1885, ch. 342, sec. 6.
1895.	673	1, 2, 3.....	Amends L. 1885, ch. 342, secs. 1, 2, 3.
1896.	682	All.....	Amends L. 1878 ch. 315, sec. 13.
1896.	915	All.....	Amends L. 1885, ch. 342, s. 5.

CODE OF CIVIL PROCEDURE, CHAPTER XXII.

TITLE III.

(The words in *Italics* are new.)

PROCEEDINGS FOR THE ENFORCEMENT OF MECHANICS' LIENS ON REAL PROPERTY.

- Sec. 3398. Purpose of title ; definitions.
3399. Enforcement of a mechanic's lien on real property.
3400. Enforcement of a lien under contracts for a public improvement.
3401. Action in a court of record ; consolidation.
3402. Parties to action in a court of record.
3403. Equities of lienors to be determined.
3404. Action in a court not of record.
3405. When personal service cannot be made.
3406. Proceedings on return of summons ; judgment by default.
3407. Issue ; how tried.
3408. Executions.
3409. Appeals from judgments in courts not of record.
3410. Transcripts of judgment in courts not of record.
3411. Costs and disbursements.
3412. Judgment in case of failure to establish lien.
3413. Offer to pay into court.
3414. Preference over contractors.
3415. Judgment may direct delivery of property in lieu of money.
3416. Judgment for deficiency.
3417. Discharge of mechanic's lien by order of court.
3418. Judgments in actions to foreclose liens on account of public improvements.
3419. Judgment in action to foreclose a mechanic's lien on property of a railroad corporation.

§ 3398. **Purpose of title ; definitions.**—This title is to be construed in connection with article one of the lien law, and provides proceedings for the enforcement of

liens for labor performed and materials furnished in the improvement of real property, created by virtue of such article. The terms "real property," "lienor," "owner," "improvement," "public improvement," "contractor," "sub-contractor," "materialman" and "laborer," as used in this title, are defined by section two of such law.

§ 3399. **Enforcement of a mechanic's lien on real property.**—A mechanic's lien on real property may be enforced against such property (pp. 111–112), and against a person liable for the debt (pp. 113–115) upon which the lien is founded, by an action, by the lienor, his assignee or legal representative, *in a court which has jurisdiction in an action founded on a contract for a sum of money equivalent to the amount of such debt* (p. 124).

§ 3400. **Enforcement of a lien under contract for a public improvement.**—A lien for labor done or materials furnished for a public improvement may be enforced against the funds of the municipal corporation for which such public improvement is constructed, to the extent prescribed in article one of the lien law, *and against the contractor or sub-contractor liable for the debt, by a civil action, in the same court and in the same manner as a mechanic's lien on real property* (p. 115).

§ 3401. **Action in a court of record; consolidation.**—The provisions of this code, relating to actions for the foreclosure of a mortgage upon real property, and the sale and the distribution of the proceeds thereof, apply to actions in a court of record, to enforce mechanics' liens on real property, except as otherwise provided in this title (p. 130). If actions are brought by different lienors in a court of record, the court in which the first action was brought may, upon its own motion, or upon the

application of any party in any of such actions, consolidate all of such actions (p. 101).

§ 3402. **Parties to an action in a court of record** (pp. 86-89).—In an action in a court of record the following are necessary parties defendant :

1. All lienors having liens against the same property or any part thereof (p. 87).

2. All other persons having subsequent liens or claims against the property, by judgment, mortgage or otherwise (p. 87), and

3. *All persons appearing by the records in the office of the county clerk or register to be overseers of such property or any part thereof* (p. 86). Every defendant who is a lienor shall, by answer in the action, set forth his lien, or he will be deemed to have waived the same, unless the lien is admitted in the complaint, and not contested by another defendant (pp. 93, 99). *Two or more lienors having liens upon the same property or any part thereof may join as plaintiffs* (p. 87).

§ 3403. **Equities of lienors to be determined.**—The court may adjust and determine the equities of all the parties to the action and the order of priority of different liens, and determine all issues raised by any defense or counter-claim in the action (pp. 115, 125).

§ 3404. **Action in a court not of record** (p. 103).—If an action to enforce a mechanic's lien against real property is brought in a court not of record, it shall be commenced by the personal service upon the owner, anywhere within the state, of a summons and complaint verified in the same manner as a complaint in an action in a court of record. The complaint must set forth substantially the facts contained in the notice of lien, and the substance of the agreement under which the labor was performed or

the materials were furnished (p. 98). The form and contents of the summons shall be the same as provided by this code for the commencement of an action upon a contract in such court. The summons must be returnable not less than twelve nor more than twenty days after the date of the summons, or, if service is made by publication, after the day of the last publication of the summons. *Service must be made at least eight days before the return day* (p. 104).

§ 3405. **When personal service cannot be made.**—If personal service of the summons cannot be made upon a defendant in an action in a court not of record, by reason of his absence from the state, or his concealment therein, such service may be made by leaving a copy thereof at his last place of residence and by publishing a copy of the summons once in each of three successive weeks in a newspaper in the city or county where the property is situated (p. 104).

§ 3406. **Proceedings on return of summons ; judgment by default.**—At the time and place specified in the summons for the return thereof, in a court not of record, issue must be joined, if both parties appear, by the defendant filing with the justice a verified answer (p. 99), containing a general denial of each allegation of the complaint, or a specific denial of one or more of the material allegations thereof ; or any other matter constituting a defense to the lien or to the claim upon which it is founded. If the defendant fails to appear on the return-day, on proof by affidavit of the service of the summons and complaint, judgment may be rendered for the amount claimed, with costs (p. 116).

§ 3407. **Issue, how tried.**—If issue is joined in such action in a court not of record, it must be tried in the

same manner as other issues in such court, and judgment entered thereon, which shall be enforced, if for the plaintiff, in the manner provided in the following section (p. 116). If for the defendant, in the same manner as in an action on contract in such court (p. 107).

§ 3408. **Executions.**—Execution may be issued upon a judgment obtained in an action to enforce a mechanic's lien against real property in a court not of record, which shall direct the officer to sell the title and interest of the owner in the premises, upon which the lien set forth in the complaint existed at the time of filing the notice of lien (p. 121).

§ 3409. **Appeals from judgments in courts not of record.**—An appeal may be taken from such judgment rendered in a court not of record, according to the provisions of this code regulating appeals from judgments in actions on contract in such courts (p. 120).

§ 3410. **Transcripts of judgment in courts not of record.**—When a judgment is rendered in a court not of record, the justice or judge of the court in which it is tried, or other person authorized to furnish transcripts of judgments therein, shall furnish the successful party a transcript thereof, which he may file with the clerk of the county with whom the notice of lien is filed. The filing of such transcript has the same effect as the filing of a transcript of any other judgment rendered in such courts.

§ 3411. **Costs and disbursements.**—If an action is brought to enforce a mechanic's lien against real property in a court of record, the costs and disbursements shall rest in the discretion of the court, and may be awarded to the prevailing party (pp. 117–118). The judgment rendered in such an action shall include the amount of such costs and specify to whom and by whom the

costs are to be paid. If such action is brought in a court not of record, they shall be the same as allowed in civil actions in such court. The expenses incurred in serving the summons by publication may be added to the amount of costs now allowed in such court.

§ 3412. **Judgment in case of failure to establish lien.**—If the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this title, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action (pp. 113–115).

§ 3413. **Offer to pay into court.**—At any time after an action is brought under the provisions of this title, the owner may make *and file with the clerk* with whom the notice of lien is filed, if in a court of record, and if in a court not of record, with the court, an offer to pay into court the sum of money stated therein, and to execute and deposit securities which he may describe, in discharge of the lien, *and serve upon the plaintiff a copy of such order*. If a written acceptance of the offer is filed with such clerk, or court, within ten days after its service, and a copy of the acceptance is served upon the party making the offer, the court, upon proof of such offer and acceptance, may make an order, that on depositing with such clerk, or court, the sum so offered, or the securities described, the lien shall be discharged, and that the money or securities deposited shall take the place of the property upon which the lien existed, and shall be subject to the lien. *If the offer is of money only, the court, on application and notice to the plaintiff, may make such order, without the acceptance of the offer by the plaintiff. Money or securities deposited upon the acceptance of an offer pursuant to this sec-*

tion shall be held by the clerk or the court until the final determination of the action, including an appeal (pp. 80-81).

§ 3414. **Preference over contractors.**—When a laborer or a materialman shall perform labor or furnish materials for an improvement of real property for which he is entitled to a mechanic's lien, the amount due to him shall be paid out of the proceeds of the sale of such property under any judgment rendered pursuant to this title, in the order of priority of his lien, before any part of such proceeds is paid to a contractor or sub-contractor (p. 62). If several notices of lien are filed for the same claim, as where the contractor has filed a notice of lien for the services of his workmen, and the workmen have also filed notices of lien, the judgment shall provide for but one payment of the claim which shall be paid to the parties entitled thereto in the order of priority (p. 115). Payment voluntarily made upon any claim filed as a lien shall not impair or diminish the lien of any person except the person to whom the payment was made.

§ 3415. **Judgment may direct delivery of property in lieu of money.**—If the owner has agreed to deliver bills, notes, securities or other obligations or any other species of property, in payment of the debt upon which the lien is based, the judgment may direct that such substitute be delivered or deposited as the court may direct, *and the property affected by the lien cannot be sold, by virtue of such judgment, except in default of the owner to so deliver or deposit within the time directed by the court* (p. 115).

§ 3416. **Judgment for deficiency.**—If upon the sale of the property under judgment in a court of record there is a deficiency of proceeds to pay the plaintiff's claim,

judgment may be docketed for the deficiency against any person liable therefor, who shall be adjudged to pay the same in like manner and with like effect as in judgments for deficiency in foreclosure cases (pp. 113-115).

§ 3417. **Discharge of mechanic's lien, by order of court.**—A mechanic's lien on real property may be vacated and cancelled by an order of a court of record. Before such order shall be granted a notice shall be served upon the lienor, either personally or by leaving it at his last-known place of residence, with a person of suitable age, with directions to deliver it to the lienor. Such notice shall require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed should not be vacated and cancelled of record. Proof of such service and that the lienor has not commenced the action to foreclose such lien, as directed in the notice, shall be made *by affidavit*, at the time of applying for such order (pp. 77-78, 101).

§ 3418. **Judgments in actions to foreclose liens on account of public improvements.**—If, in an action to enforce a lien on account of a public improvement, the court finds that the lien is established, it shall render judgment directing the municipal corporation to pay over to the lienors entitled thereto for work done or material furnished for such public improvement, and in such order of priority as the court may determine (p. 64), to the extent of the sums found due the lienors from the contractors, so much of the funds or money which may be due from the state or municipal corporation to

the contractor, as will satisfy such liens, with interest and costs, not exceeding the amount due to the contractor.

§ 3419. **Judgment in actions to foreclose a mechanic's lien on property of a railroad corporation.**—If the lien is for labor done or materials furnished for a railroad corporation, upon its land, or upon or for its track, rolling stock or the appurtenances of its railroad, the judgment shall not direct the sale of any of the real property described in the notice of the lien, but when in such case, a judgment is entered and docketed with the county clerk of the county where the notice of lien is filed, or a transcript thereof is filed and docketed in any other county, it shall be a lien upon the real property of the railroad corporation, against which it is obtained, to the same extent, and enforceable in like manner as other judgments of courts of record against such corporation.

SCHEDULE OF LAWS REPEALED.

Laws of.	Chapter.	Sections.	Subject.
1875.	392	3, 4.....	Enforcement of mechanics' liens on railroad.
1878.	315	6, 7, 8, 9, 10, 11, 12.....	Enforcement of mechanics' liens on account of public improvement.
1880.	440	5, 6, 7, 8, 9, 10.....	Enforcement of liens on oil wells.
1885.	342	All except §§ 1, 2, 3, 4, 5, 6, 24, 25.....	Enforcement of mechanics' liens on real property.

Laws of.	Chapter.	Sections.	Subject.
1891.	255	6, 7, 8, 9.....	Amends L. 1878, ch. 315.
1892.	629	6, 7, 8, 9.....	Amends L. 1878, ch. 315.
1895.	673	All.....	Amends L. 1885, ch. 342, § 20.

APPENDIX.

CHAPTER I.

WHO MAY ACQUIRE THE LIEN.

(B.) SUB-CONTRACTORS AND MATERIALMEN.

Non-residence is not a bar to the right to file a lien under the Mechanic's Lien Law of this state, where the material is actually delivered in this state, and used in the construction of the building against which the lien is filed. (*In re Simonds Furnace Co.*, 61 N. Y. Supp. 974; *Campbell v. Coon*, 149 N. Y. 556.)

(C.) ASSIGNMENT OF LIENS.

The assignee of a mechanic's lien is not bound to give notice of the assignment to the owner, and by not doing so, he simply takes his chances of the owner and contractor so dealing with the funds as to affect his rights. (*Lawrence v. Cong. Church*, 32 App. Div. 489.)

CHAPTER II.

THE CONTRACT.

(A.) THE ORIGINAL CONTRACT.

The minds must meet upon the contract before the parties become bound thereby; hence under a contract signed by

owner and contractor, which refers to specifications as part of the contract, and to be evidenced by the signatures of the parties, when it appears that the specifications were not signed by the contractor, because of his refusal to accept the terms therein recited, he was not bound by them and he could not be held for work called for in the specifications and not mentioned in the contract. (*Lennon v. Smith*, 23 App. Div. 293.)

The lienor knows or ought to know the amount which the owner has contracted to pay. (*Spruck v. McRoberts*, 139 N. Y. 193; *McLean v. Sanford*, 26 App. Div. 603.)

The contract may be based on an antecedent consideration; the test being whether the owner has received value in return for the obligation he has assumed. So when the owner of a vacant house contracted with a mechanic to repair her house and the latter, by mistake, entered the adjoining vacant house and repaired it and discovered the mistake only after the work was completed, the owner of the house benefited may be held on his voluntary promise to pay for the improvement, and a lien filed for such work will be sustained. In this case Judge Gaynor held that the consideration was sufficient, in that the owner of the house in which the work was done had received full antecedent value for his promise to pay. (*Drake v. Bell*, 26 Misc. 237.)

The custom of the trade is part of every contract and need not be expressly recited. So a contract to lay brick at so much "per thousand" means not an actual count of bricks, but a computation by cubic feet according to custom. (*Brunold v. Glasser*, 25 Misc. 285.) Testimony of builders as to the meaning of the word "partitions" in the specifications is competent. (*Tibbits v. Phipps*, 30 App. Div. 274.)

CHAPTER III.

WHAT THE LIEN BINDS.

(A.) THE INTEREST OF THE OWNER.

The provision in section 4 of the Lien Law that "if an owner assigns his interest in such real property by a general assignment for the benefit of creditors, within thirty days prior to such filing, the lien shall extend to the interest thus assigned," applies to liens against public improvements as well as against real property, when filed by a creditor of a sub-contractor, after that sub-contractor has made a general assignment for the benefit of creditors. (*Reading Hardware Co. v. City of New York*, 27 Misc. 448.)

When the lienor has full knowledge of the fact and so states in his notice of lien, that the land belongs to one person and the house to another, and claims only against the owner of the house, the interest of the owner is not affected, and no subsequent claim against him under such notice will be allowed. (*Grippen v. Weed*, 22 App. Div. 593.)

"Under the Lien Law, buildings must be considered as real estate, regardless of any agreement with the owner of the land as to the right of removal; and one who furnishes labor and materials for their construction or repair may acquire a lien for his claim upon the land itself, under the same circumstances which would subject the land to that lien, provided no agreement for the removal of the buildings existed." (*Hilton & Dodge Lumber Co. v. Murray*, 47 App. Div. 289. In such cases, both land and buildings are subject to the lien and the burden of the lien may be apportioned between the owners of land and buildings according to value respectively. (*Hilton & Dodge Lumber Co. v. Murray*, 47 App. Div. 289.)

CHAPTER IV.

THE EXTENT OF THE LIEN.

(A.) THE BALANCE DUE THE CONTRACTOR.

The owner is liable only for the balance due the contractor. Hence a sub-contractor can only reach that balance, in the absence of a special promise on the owner's part. (*Shulman v. Maison*, 54 N. Y. Supp. 1009.)

In contracts which do not contain a provision for continuance by owner on breach by contractor, abandonment of the work by the contractor, leaves nothing "remaining due" to him, to which the liens of sub-contractors can attach (*Jones v. Savage*, 24 Misc. 158; *De Lorenzo v. Von Raitz*, 44 App. Div. 329). But in contracts which do contain such a provision for continuance by the owner as agent for the contractor, after contractor's default, the lien of a sub-contractor will reach only the difference between what remained unpaid under the contract and the cost of completion. (*Robinson v. Chinese Char. Ass'n*, 35 App. Div. 439; *Schmohl v. O'Brien*, 25 Misc. 699; *Dyer v. Osborne*, 28 Misc. 234; *De Lorenzo v. Von Raitz*, 44 App. Div. 329.)

The lienor knows or ought to know, the limit of liability on the part of the owner (*Spruck v. McRoberts*, 139 N. Y. 193; *McLean v. Sanford*, 26 App. Div. 603); and the mere fact that a contractor agrees to pay his sub-contractors more than he is to receive from the owner, does not make the owner liable beyond his contract. (*De Lorenzo v. Von Raitz*, 44 App. Div. 329.)

(B.) ANY AMOUNT FOR WHICH THE OWNER HAS BECOME PERSONALLY LIABLE.

Under a contract where the owner agreed to pay all claims for materials, etc., and to divide the proceeds of sale of the

buildings with the contractor, his promise is not an original promise, and he is liable to all material men only after he has sold the houses or has failed to do so in a reasonable time, and is then liable only for the net proceeds of the sale. (*Brumme v. Herod*, 56 Supp. 670.)

A contractor, not being able to obtain materials on his own credit, sought the owner's guaranty on his purchase of this material and obtained it. On the delivery of the materials, the owner gave his note to the material man. Other subcontractors filed liens; held, that there was nothing due from owner to contractor to which the liens could attach, since the part of the contract price for material had been taken out of the contract and paid for as above by the owner. (*Craig v. Blake*, 27 Misc. 546.)

An antecedent consideration may be sufficient to support the owner's promise to pay. So where the owner of a house contracted with a mechanic to repair her vacant house, and the latter, by mistake, entered the adjoining vacant house and repaired it, and the owner of the house benefited promised to pay the mechanic but failed to do so; held, that a lien filed by the mechanic was good, and that there was sufficient consideration, in that the owner of the house in which the work was done had received full antecedent value for his promise. (*Drake v. Bell*, 26 Misc. 237.)

CHAPTER V.

CONSENT OF THE OWNER.

(B.) IMPLIED CONSENT.

This question of the "consent" of the owner has been one of the most vexed questions under the Lien Law.

The cases in which it can arise are in two classes; first,

where the building or improvement is entirely new, and second, where the improvement consists of some repairs or additions to an existing building, which is under lease.

In the first class of cases, the controversy was usually as to whether the vendor or vendee under an executory contract of sale was the owner, but that has been settled by the language of the Lien Law, which declares (section 2) that "a vendee in possession under a contract for the purchase of real property" is the owner under the act.

The last decision under the old act of 1885 was almost in line with the amendment of 1897 in the present Lien Law. "The term 'with the consent of the owner' as used in the statute [act of 1885] implies that the owner has power to give or withhold his consent in respect to the construction, alteration or reparation of the building. In case the vendor in an executory contract has no authority to require the vendee to build, alter or repair, and has no power to prevent him from doing so, his interest can not be charged with a mechanic's lien for the erection, reparation or improvement of a building, ordered by the vendee simply because he (the vendor), knowing that the work has to be done and knowing that it is being done, does not try to stop what he has no power to prevent." (*Vosseller v. Slater*, 25 App. Div. 368.) The provision in the act of 1885 as to consent of the owner was not intended to apply to a "case in which the owner in fee has contracted in good faith to sell and convey it to a vendee, who has the right of possession of the land under the contract, provided the contract of sale was executed and possession thereunder given before the contract was made by the vendee for constructing or altering the buildings, and provided the contract of sale does not provide that the vendee shall erect a building on the premises." (*Vosseller v. Slater*, 25 App. Div. 368.)

So that there now remains under the first class of cases only those in which there is a dispute as to whether the agent of

an undisclosed principal or the principal is the owner, who is to give the "consent." This is usually only in cases where the wife is the owner and acts through her husband, who fails to disclose his wife's ownership. When the owner is present at the making of the contract by her husband, is also present constantly during the progress of the work and places a mortgage on the house to pay for the improvements, her consent is shown. (*Brunold v. Glasser*, 25 Misc. 285.)

Under the second class of cases, *i. e.*, leased premises on which extensive repairs or improvements have been made, the decisions have varied. At the time of the publication of the first edition of this work (September, 1897), the Court of Appeals had just announced the rule as laid down in *Hankinson v. Vantine* (see p. 30) that express consent by the owner to the particular alteration made, or knowledge of the particular object for which the repairs were being made, must be shown to bind the owner. Following this the Appellate Division held that under a lease which permitted certain specified improvements and provided that no further change could be made except on the written consent of the owner, consent will not be inferred from casual conversations, but must be clearly and unequivocally shown (*DeKlyn v. Simpson*, 34 App. Div. 436); but when the lease empowers the tenant to make "repairs and renovations" up to a fixed amount and deduct the cost from the rent, the consent of the owner is expressly given and the tenant is his agent under this given limited authority. (*McLean v. Sanford*, 26 App. Div. 603.)

The consent of the lessor may still be implied from the circumstances (*Nason Ice Machine Co. v. Upham*, 26 App. Div. 420); and now, May, 1900, the Court of Appeals has laid down the rules to determine the consent of the owner as follows:

"(1) That no express consent is necessary on the part of the owner in order to bring the case within the statute providing for mechanics' liens.

(2) That a consent may be implied from the conduct and attitude of the owner with respect to the improvements which are in process of construction upon his premises.

(3) The facts from which the inference of consent is to be drawn must be such as to indicate a willingness on the part of the owner to have the improvements made or an acquiescence in the means adopted for that purpose, with knowledge of the object for which they are employed.

(4) The omission of the owner to object to improvements made upon his premises by a tenant, when he has knowledge of the circumstances under which they are being made, is always an important fact bearing upon this question." (*Nat. Wall Paper Co. v. Sire*, 163 N. Y. 122.)

The material man should inquire as to the condition of the title and the consent of the owner; otherwise he will be assumed to give credit only to the contractor. (*Hartley v. Murtha*, 36 App. Div. 196.)

CHAPTER VI.

WHO IS THE OWNER.

A lienor who deals with the husband, believing him to be the owner and later discovers that the wife is the owner of two of the three houses, must elect whether to hold the husband as agent for the undisclosed principal; and having elected to hold the husband personally liable he can not afterwards claim also against the wife. (*Booth v. Barron*, 29 App. Div. 66.)

CHAPTER VII.

ACTS OF LIENOR FROM WHICH THE LIEN SPRINGS.

(A.) PERFORMANCE ON HIS PART.

When the owner sets up non-performance as an answer to the lienor's claim, the fact of non-performance may be explained. The reason why the architect refuses to give his certificate may be shown. (*Tibbits v. Phipps*, 30 App. Div. 274.) When the owner sets up failure to perform in proper manner, the lienor may meet it by expert testimony and a decision in lienor's favor by the trial court is on a question of fact, which will not be disturbed on appeal. (*Union Stove Works v. Klingman*, 20 App. Div. 449.)

A sub-contractor, who has furnished a grade of tin chosen by the chief contractor, but which is inferior to the specifications, may recover on showing that the tin was used with the consent of the owner and on allowance made to him by the chief contractor for the difference in price. (*May v. Menton*, 21 Misc. 321.)

(C.) SUBSTANTIAL COMPLIANCE.

On showing substantial compliance, the contractor may recover the contract price without further proof of value. (*Lennon v. Smith*, 23 App. Div. 293.)

CHAPTER VIII.

ACTS OF OWNER WHICH WILL DEFEAT THE LIEN.

(A.) DEATH OR CHANGE OF TITLE.

While a *bona fide* change of title destroys the right to lien, a fraudulent conveyance does not do so, and the fraudulent conveyance by which the owner seeks to place his property beyond the reach of the lienor may be attacked in the action to foreclose the lien, and it is enough to join the owner and the present holder of the title. Intermediate grantees, who were mere conduits to pass title, are not necessarily parties (*Bierschenk v. King*, 38 App. Div. 360). The fraudulent conveyance may be attacked by the lienor, even when the fraudulent grantee is not a party defendant. (*Parsons v. Moses*, 40 App. Div. 58.)

(B.) PAYMENT IN GOOD FAITH.

Payment in good faith means final discharge of the obligation by the person on whom it rests. The lien is merely security for its payment, and the giving of additional security, like a mortgage, does not in itself release the one giving the additional security from the mechanic's lien. So a contractor who has stipulated to receive payment in a certain manner from a mortgage to be raised on the premises, is not barred from filing a lien, but he can not foreclose it until after default by the owner (*Firth v. Rehfeldt*, 30 App. Div. 326); and if the owner gives the contractor a mortgage as security for payment of the contract price, a lien filed by a sub-contractor will reach the mortgage; hence payment of the mortgage by the owner, after lien filed, will not relieve him as

against the claim of the lienor (*Gass v. Souther*, 46 App. Div. 256). The assignment of such a mortgage will be subject to all the equities, *i. e.*, subject to the lienor's claim. (*Gass v. Souther*, 46 App. Div. 256.)

The owner is liable to the lienor as soon as he has notice of the filing of the lien; so when he was served with the notice of lien by a sub-contractor during the progress of a trial by the contractor against him, he cannot ignore the notice, and having paid the judgment recovered against him by the contractor, he is still liable to the sub-contractor and pay him over again. (*Reeves v. Seitz*, 47 App. Div. 267.)

(C.) ADVANCE OR COLLUSIVE PAYMENTS.

All advance payments are not forbidden by the Lien Law, but only such as are made in advance by collusion or for the purpose of avoiding the act. This, of course, can only apply to payments made by the owner to the chief contractor with a view to cutting off the sub-contractors and securing to the contractor what ought to go to the payment of his sub-contractors.

In *Beardsley v. Cook*, cited on p. 46, no fraud was charged or proved, but it was held that payments made to the contractor after an order had been accepted by the owner, were void against the holder of the order.

In a decision in September, 1897, in the Third Department, the whole subject of advance payments is considered, and the cases of *Hilton Bridge Co. v. N. Y. C. & H. R. R. Co.*, 145 N. Y. 390; *Cheney v. Troy Hosp. Ass'n*, 65 N. Y. 282; *Post v. Campbell*, 83 N. Y. 279, 283; *Banham v. Roberts*, 78 Hun, 246, are distinguished and shown to be based upon the wording of chapter 478 of 1862, which differed from the act of 1885 and the present Lien Law. It is accordingly held that "except in cases of fraud or collusion, the owner can not be compelled to pay any greater sum than the amount speci-

fied in the contract." (*Miller v. Smith*, 20 App. Div. 507, 512.)

This prohibition of the act against advance payments applies to contractors as well as owners (*Smack v. Cath. of the Incarnation*, 31 App. Div. 559; *Lawrence v. Dawson*, 34 App. Div. 211.) A sub-contractor, who has deferred filing a lien because of statements made to him by his contractor and the chief contractor, may recover against the chief contractor for money paid out in disregard of such statements and before the time of payment fixed in the contract (*Lawrence v. Dawson*, 34 App. Div. 211.)

CHAPTER IX.

THE ACTS WHICH WILL DEFEAT THE LIEN OF THE CONTRACTOR.

(A.) NON-PERFORMANCE BY HIMSELF.

Non-performance by contractor will prevent recovery on the contract. (*Kohl v. Fleming*, 21 Misc. 690.) Interference by owner to prevent work excuses non-performance, and contractor may have lien and recover on *quantum meruit*. (*Lennon v. Smith*, 23 App. Div. 293.)

CHAPTER X.

THE ACTS WHICH WILL DEFEAT THE LIEN OF A SUB-CONTRACTOR.

(B.) NON-PERFORMANCE BY CHIEF CONTRACTOR.

One who takes a sub-contract under the contractor is not in privity with the owner, and can only reach him through the

contractor; hence he must bear the same burden of proof of performance by the contractor. (*Brainard v. County of Kings*, 155 N. Y. 538.)

(C.) DISPOSAL BY CONTRACTOR OF BALANCE DUE HIM BY
ASSIGNMENT PRIOR TO FILING LIEN.

At the time of the publication of the first edition of this book the last important decision on this point was *Bates v. Salt Springs Nat. Bank*, 88 Hun, 236, where it was held under a contract which provided that no payment should be made until there was produced a certificate from the County Clerk that there were no liens of record, that an assignment of money due under the contract must give way to liens filed. This ruling was reversed in the Court of Appeals, where it was held that the clause in the contract was solely for the benefit of the owner, and his act in paying into court the balance due under the contract after deducting the cost of completion, was a waiver of the requirements of the production of the county clerk's certificate that there were no unsatisfied liens. It being admitted that the owner owed the contractor and the contractor the bank, there was nothing to prevent the contractor from assigning to the bank the balance due him, and since this was done before liens were filed, there remained nothing due the contractor to which the liens could attach. (*Bates v. Salt Springs Nat. Bank*, 157 N. Y. 322.)

This last decision was under the act of 1885, prior to the amendment of 1896.

Now, under the Lien Law, it seems that an order on the owner made and paid before notice of lien filed, is valid without being filed, and that the statute applies only to orders on the owner which are to be paid subsequently. (*Lawrence v. Dawson*, 50 App. Div. 570.)

There is a distinction between liens for the improvement of real property and liens for public improvements, and the

rule as to filing of orders applies only to the former. The Consolidation Act (chap. 410 of 1882, secs. 1824-1838) was not repealed by the Lien Law, but these sections were expressly repealed by chap. 195 of 1899. Until then they remained in force in the city of New York. (*McKay v. City of New York*, 46 App. Div. 579.)

The contract provisions in city contracts against liens is solely for the protection of the city, and does not prevent an assignment by the contractor of money due or to grow due. (*McKay v. City of New York*, 46 App. Div. 579.)

And when a sub-contractor gives an order on the contractor, which is accepted by him, it is an equitable assignment and can not be disputed by the sub-contractor, and a lien filed by him or his creditors must give way to such order. (*McKay v. City of New York*, 46 App. Div. 579.)

It is not necessary to file in the county clerk's office an order given by the contractor under a public improvement, for section 15 does not apply to such improvement. The old rule prevails in such contracts, and an order brought to the notice of the payee is an equitable assignment and superior to the rights of a subsequent lienor. (*Brace v. City of Gloversville*, 39 App. Div. 25.) The amendment of chap. 915 of 1896 to the act of 1885 (requiring the filing of orders) did not apply to public improvements. Hence prior to September 1, 1897, when the Lien Law took effect, there was nothing to prevent such an assignment by a sub-contractor of what was due him from the chief contractor, and a lien could only affect the balance left. In public improvements the chief contractor corresponds to the owner under private contracts (*Lawrence v. Dawson*, 50 App. Div. 570). But note that in this case the court seems to imply that the filing of orders in public improvements is required by the Lien Law, which is not the fact.

The United States Bankruptcy Act has introduced a new element into the Mechanic's Lien Law of this state. The

Lien Law of this state differs widely from laws on the same subject in most of the other states. There the lien arises with the beginning of the labor or the furnishing of the materials, and is not dependent on the filing of the notice. In New York the lien arises only on the filing of the notice. The delicate balance of the commercial side of a building operation and the reluctance of the material men and sub-contractors to file liens has been referred to (p. 51), and the Lien Law appears to take note of the fact in two ways: (1) by permitting a lien to be filed at any time during the progress of the work, in which case the lien is fed by the work thereafter performed, and is security for whatever is due at the time suit is brought to foreclose it, and (2) by permitting the filing of liens against the premises for thirty days after an assignment for the benefit of creditors without regard to such assignment.

The National Bankruptcy Act contains no such preferential clause; on the contrary, it forbids such preferences and annuls all rights acquired over the bankrupt's assets by legal proceedings within four months prior to the bankruptcy. And it has been held that the filing of a mechanic's lien is a legal proceeding and as such must fail, if filed within four months prior to the bankruptcy. (*In re Emslie*, 3 Amer. Bank. Rep. 282, and *In re Emslie & Son*, 3 Amer. Bank. Rep. 516.) In these cases Judge Brown discusses the New York act at length and rules against its preferences, holding that a sub-contractor or material man, who refrains from exercising his rights under the New York Lien Law to file his notice of lien during the progress of work, waives this form of security, unless more than four months elapse between the date of filing and the date of bankruptcy. On appeal, however, the Circuit Court of Appeals reversed this decision, holding that the Lien Law of New York did not substantially differ from other states and that a mechanic's

lien was not within the prohibitions of section 67. (*In re Emslie*, 4 Am. B. R. 126.)

(D.) PAYMENT IN GOOD FAITH.

A sub-contractor necessarily claims under his chief contractor, and is bound by his acts; hence it follows that if the owner has paid the contractor and the contractor has paid the sub-contractor, all in good faith, the person who has supplied materials to the sub-contractor can have no lien for his claim. (*Smack v. Cath. of the Incarnation*, 31 App. Div. 559.)

The acceptance of notes by the material man does not destroy the right to lien, but merely postpones it. It is not payment if the notes be dishonored, and if the lien be filed on the maturity of the unpaid notes and within three months, it is valid. (*Miller v. Smith*, 20 App. Div. 507.)

CHAPTER XI.

FOR WHAT A LIEN MAY BE FILED.

A lien may be filed for furnaces, ranges and necessary connections (*Union Stove Works v. Klingman*, 20 App. Div. 449); for an ice-making plant (*Nason Ice Machine Co. v. Upham*, 26 App. Div. 420). But removable mirrors are not the subject of a lien (*Vogel v. Farrand*, 26 Misc. 130), and a lien can not be filed for damages for breach of contract by the owner, and such a claim can not be included in a lien, which properly claims for some items. (*Doll v. Coogan*, 48 App. Div. 121.)

CHAPTER XII.

WHEN THE LIEN ARISES.

(B.) WITHIN THE STATUTORY PERIOD.

The doing of a small piece of work, not connected with the previous work, after the period in which to file a notice of lien for such previous work has expired, will not suffice, and the lien will fail. (*McLean v. Sanford*, 26 App. Div. 603.)

(C.) PRIORITY.

When a receivership in supplementary proceedings is perfected before the lien is filed, the latter has no validity against the receiver. (*Smith v. Pierce*, 60 N. Y. Supp. 1011.)

CHAPTER XIII.

THE NOTICE OF LIEN.

(B.) FALSITY OF ITS STATEMENTS.

A false statement will invalidate the notice of lien, when the lienor knows it to be false (*Aeschlimann v. Presbyterian Hospital*, 29 App. Div. 630), but the filing of a second notice of lien, in which the name of the owner is mistakenly given, does not affect the rights of the claimant under the first notice, in which such name is properly given. (*Kerrigan v. Fielding*, 47 App. Div. 246.)

(D.) AGAINST WHOM CLAIMED.

A mistake in the notice of lien in the name of the owner does not impair the lien, but when the lienor with full knowledge that the land belongs to one person and the house to another, claims only against the owner of the house in his notice of lien, it is not a mistake, and the lien will not be extended to cover the interest of the owner of the land (*Grippin v. Weed*, 22 App. Div. 593; *DeKlyn v. Simpson*, 34 App. Div. 436.)

When the owner has given a deed of the premises to secure claims thereon, it is in fact a mortgage and he is still the owner, and a notice of lien which describes him as owner, correctly states the facts. (*Kerrigan v. Fielding*, 47 App. Div. 246.)

(E.) SIGNATURE AND VERIFICATION.

There is no provision in the Lien Law requiring the signing of the notice of lien and it need not be signed (*Reeves v. Seitz*, 47 App. Div. 267), and the affidavit of verification need not be signed by the lienor (*Reeves v. Seitz*, 47 App. Div. 267). A notice of lien, duly signed and which was verified by the lienor, but to which the officer taking the verification forgot to sign his name and which was filed in that imperfect state, is nevertheless entitled to its priority, and the defect may be supplied later. (*Sage v. Stafford*, 42 App. Div. 449.)

A verification by an agent in the words of the statute is sufficient (*Union Stove Works v. Klingman*, 20 App. Div. 449), although under the Consolidation Act, which contained no provision for the signing by an agent, a notice of lien so signed and verified was void. (*McDonald v. Mayor*, 29 Misc. 504.)

(G.) NATURE AND AMOUNT OF SERVICES.

The notice must comply substantially with the statute in stating the nature and amount of the labor and services performed under the contract and for extra work, and failure to do so will invalidate the lien. (*McKinney v. White*, 15 App. Div. 423.)

(I.) SERVICE ON OWNER.

Since the Lien Law permits service of the notice of lien on the owner at any time, service upon him of a notice filed by a sub-contractor in the midst of a trial in an action by the chief contractor to foreclose a lien filed by him is sufficient. (*Reeves v. Seitz*, 47 App. Div. 267.)

CHAPTER XIV.

TERMINATION OF THE LIEN.

A lien can be discharged only in the manner prescribed in the Lien Law (*Madden v. Lennon*, 23 Misc. 79). It seems, that when a lien has been satisfied, the interest of the lienor in the premises ceases. (*Sheldon v. Palliser*, 23 App. Div. 191.)

(A.) TERMINATION BY EXPIRATION OF TIME.

When a deposit has been made and the lien discharged, the lien runs indefinitely against the funds, and there is no time limit. (*Perini v. Schmyg*, 53 Supp. 946.) But by an amendment of 1899 (see p. 145) a lien may be extended by an order of court or a judge for a period not exceeding six months (section 17).

(B.) BY DEPOSIT.

After a deposit has been made, it is too late to offer a bond, for the deposit cannot be withdrawn. (*Matter of Mech. Lien against 478 Cherry St.*, 27 Misc. 682.)

(C.) BY GIVING BOND.

The Lien Law did not repeal the sections of the Consolidation Act relating to liens; hence a lien on municipal work under that act could only be discharged in the way therein provided (*Ruge v. Gallagher*, 22 Misc. 572); but these sections were expressly repealed by chap. 195 of 1899.

Under the act of 1885 a contractor could bond the lien of a sub-contractor (this is not now the rule under the Lien Law); so the sub-contractor having sued on the bond and obtained a judgment against the contractor and his sureties was not stayed by an appeal by the owner in a separate suit by the contractor to foreclose his lien. (*Heagney v. Hopkins*, 23 Misc. 608.)

The words "bond" and "undertaking" are used synonymously in the Lien Law and mean the same thing. After a "bond" or "undertaking" has been given by the sureties and the lien discharged by the court on the faith of it, the sureties are estopped to deny the validity of the "bond" or "undertaking" on a mere technicality as to form. (*Matthiasen v. Shannon*, 25 Misc. 274.) After a bond has been given it takes the place of the land, which is thereby discharged from the lien. After such discharge, the defendants can not show that the person recited as owner in the notice of lien had no interest in the land. They have waived such point by giving the bond. (*Kerrigan v. Fielding*, 47 App. Div. 247.)

In the case of a lien on a public improvement the situation after bond given is quite different from a bonded lien on real property. In the latter case the lienor must show perform-

ance on his part and on the part of the chief contractor and a balance due the chief contractor sufficient to satisfy his lien. In the case of a bonded lien on a public improvement, the lienor need only show performance on his part within his sub-contract, and is relieved from showing performance by his chief contractor or a balance due the latter. (*Pierson v. Jackman*, 27 Misc. 425.)

CHAPTER XV.

PARTIES.

The words "overseers" in section 3402 in the Code of Civil Procedure is a misprint for "owners."

It is proper to join owner and contractor as defendants. This is not uniting two separate causes of action, but is simply following the method prescribed by the statute. It is one cause of action and only one satisfaction is sought, either from the personal liability of the contractor or the real property of the owner. (*McLean v. Sexton*, 44 App. Div. 520.)

A subsequent lienor is a necessary party, and if he is not brought in when discovered, the judgment must be reversed. (*Gass v. Souther*, 46 App. Div. 256.)

A prior mortgagee is not a proper party, and may demur to a complaint which asks to have the mortgagor and all claiming under him barred and foreclosed. (*Brown v. Danforth*, 37 App. Div. 321.)

When the lienor seeks to hold the sureties the owner is a necessary party and he can not go to trial against the sureties until he has served the owner and joined issue with him or obtained his default. (*Von Den Dreisch v. Rohrig*, 45 App. Div. 525.) After the plaintiff has joined the sureties, and other lienors, who have answered claiming relief against

the sureties, who are the same on all the bonds, it is too late to seek to leave the sureties out. All the issues may be determined by keeping them in and equity favors such procedure. (*Brewster v. McLaughlin*, 28 Misc. 50.)

CHAPTER XVI.

CAUSE OF ACTION AND DEFENSE.

(A.) CAUSE OF ACTION.

Since the lien is the security only, an action to foreclose a lien may be maintained, though there be pending another action between the same parties to recover on the contract. (*Smith v. Fleischman*, 23 App. Div. 355.)

Interference by the owner to prevent work excuses non-performance, and contractor may have lien and recover on *quantum meruit*. (*Lennon v. Smith*, 23 App. Div. 293.)

(B.) DEFENSE.

The pendency of a suit at law between the parties is not a bar to the foreclosure suit. (*Smith v. Fleischman*, 23 App. Div. 355.)

When the lienor has entered into a creditor's agreement for continuance of the work and has satisfied his lien pursuant thereto, the failure to carry out the agreement for continuance does not revive the lien or give him any right to defend against the foreclosure of the first purchase money mortgage. (*Sheldon v. Palliser*, 23 App. Div. 191.)

The action to foreclose a mechanic's lien is similar to a foreclosure on a mortgage; it proceeds *in personam* against the contractor, and *in rem* against the property. Hence any

proper counterclaim may be set up by the contractor to reduce the claim of a sub-contractor against him and thereby to reduce the claim upon the security for the debt. (*Cody v. Turn Verein*, 48 App. Div. 279.)

A counterclaim for expenses to which contractor was put by reason of refusal of city engineer to give him a certificate until it was done, can not be sustained when it appears that contractor was under no obligation to do such work as a condition for obtaining the certificate. (*Canavan v. Nally*, 24 App. Div. 147.)

When the lienor's claim fails because of non-performance on his part, a counter-claim by the owner for expenses incurred by him because of such non-performance, must also fail. (*Kohl v. Fleming*, 21 Misc. 690.)

Sureties may dispute the validity of the lien which they have bonded. (*Parsons v. Moses*, 40 App. Div. 58.) Sureties are not bound by a default on the part of the contractor, their principal, but may set up any defense available to him. (*Aeschlimann v. Presbyterian Hospital*, 29 App. Div. 630.)

Sureties on a bond given to discharge a lien stand in the place of the land and are principals with the owner, and so can not set up as a defense that the lienor must first exhaust his remedy against sureties on a bond given by the owner on appeal. (*Sullivan v. Goodwin*, 30 App. Div. 194.)

CHAPTER XVII.

PLEADINGS.

(A.) COMPLAINT.

The complaint must allege that there is something due from owner to contractor to which the lien can attach or a demurrer

will lie. (*Ball & Wood Co. v. Clark & Sons Co.*, 31 App. Div. 356.)

It is not necessary to allege that *lis pendens* was filed within the year. The fact may be proven. (*Gass v. Souther*, 46 App. Div. 256.)

The plaintiff must allege performance on his part or set forth the excuses for non-performance in part (*Robinson v. Chinese Char. Ass'n*, 47 App. Div. 69), or he may sue on a *quantum meruit*. (*Smith v. Fleischman*, 23 App. Div. 355.)

CHAPTER XVIII.

MOTIONS AND PRACTICE.

INJUNCTION.

An injunction order, on a voluntary dissolution of a corporation, forbidding all persons to sue the corporation, does not prevent the filing of a lien in a matter in which the corporation is contractor and the lienor a sub-contractor. (*In re Simonds Furnace Company*, 61 Supp. 974.)

BILL OF PARTICULARS.

A bill of particulars may be demanded when the complaint is indefinite. (*Fox v. Davidson*, 44 App. Div. 283.)

ON APPEAL.

An owner, who in his defense offers the contract in evidence, can not set up on appeal the failure of the lienor to do so. (*May v. Menton*, 21 Misc. 321.)

SETTING ASIDE SALE.

The court has power, in setting aside a sale under a judgment foreclosing a mechanic's lien against real property, where it appears that the plaintiff did not know that the owner had a wife, to order the disbursements for services in examining the title to be paid from the proceeds of the sale of the property. (*Rogers v. Menton*, 21 Misc. 535.)

CHAPTER XIX.

TRIAL.

(A.) JURY TRIAL.

On issues raised by counter-claims, the motion for a jury trial must be made within ten days after issues joined. (*Arnot v. Nevins*, 44 App. Div. 61.) It is too late to wait until the case is called for trial at Special Term and then demand a jury trial. That can only be had on motion before trial is reached, and it lies in the discretion of the judge to grant or refuse such motion. (*Smith v. Fleischman*, 23 App. Div. 355.)

When the face of the complaint fails to assert a valid lien against the premises and only demands a personal judgment for the materials furnished, notwithstanding it is in form a suit to foreclose a mechanic's lien, a motion to strike the case from the Special Term calendar will be granted. (*Johnson v. Alexander*, 23 App. Div. 538.)

CHAPTER XX.

EVIDENCE.

The burden of proof is on the plaintiff, a sub-contractor, to show that there is something due from owner to contractor, to which the lien can attach. (*Madden v. Lennon*, 23 Misc. 704.)

The notice of lien may be admitted in evidence to show that it contains sworn statements at variance with the lienor's claim on the trial. (*Guggolz v. Callan*, 54 Supp. 149.)

CHAPTER XXXI.

JUDGMENT.

(C.) AGAINST SURETIES.

The condition in a bond given to discharge the lien is violated when the court enters a decree sustaining the lien. It is not necessary to provide in the judgment that the lien be foreclosed in form against the land. (*Ringle v. Matthiessen*, 17 App. Div. 374.)

(D.) PERSONAL JUDGMENT.

Even though the complaint fails to ask for personal judgment against the sureties, this may be had, when they are joined and the complaint shows that the lien was discharged on a bond given by them. (*Matthiasen v. Shannon*, 25 Misc. 274.)

When for any reason plaintiff fails to establish his lien, he may still have personal judgment against his debtor (*Wick v. Fort Plain and Richfield Spr. R. Co.*, 27 App. Div. 577);

and judgment may be rendered in favor of a defendant lienor, who has set up and sustained his lien, although plaintiff may have failed in proving his lien (*Wick v. Fort Plain and Rich. Spr. R. Co.*, 27 App. Div. 577). But under the Consolidation Act (now repealed) there could be no personal judgment if the lien failed. (*McDonald v. Mayor*, 29 Misc. 504; *Mertz v. Mapes-Reeve Const. Co.*, 30 Misc. 343.)

CHAPTER XXXV.

LIS PENDENS.

The court has no general power to discharge a *lis pendens* in a mechanic's lien, and to do so, plaintiff must bring the case within section 1674 of the Code of Civil Procedure. (*Madden v. Lennon*, 23 Misc. 79.)

CHAPTER XXXVI.

JURISDICTION OF THE COURTS.

(C.) CITY COURTS.

The City Court of New York acquires no jurisdiction in a mechanic's lien case, when the defendant is served with the summons outside of the city of New York. (*McCann v. Gerding*, 29 Misc. 283.)

(D.) COURTS NOT OF RECORD.

The Municipal Court of the City of New York, being a new court created by the Legislature, has no equity jurisdiction, and so can not entertain a suit to foreclose a mechanic's lien. (*McConologue v. McCaffrey*, 29 Misc. 139.)

FORMS.

FORMS.

NOTICE UNDER MECHANIC'S LIEN LAW.

To HENRY D. PURROY, Esq.,
Clerk of New York County :

Take notice that I, A. B., residing at No. _____
West _____ Street, in the City of New York, have and
claim a lien for the principal and interest of the value
or the agreed price of the labor and materials herein-
after mentioned, upon the real property, improved or to
be improved, and upon such improvements, hereinafter
mentioned, pursuant to the provisions of Article 1 of
Chapter XLIX. of the General Laws of the State of
New York, known as the Lien Law.

The name of the owner of the real property and im-
provements, against whose interest therein a lien is
claimed, is C. D., and the interest of said owner, as far
as known to this lienor, is [in fee ; or by tenancy for
life ; or by lease from _____ owner in fee ; or as vendee
in possession under contract of sale with _____ .]

The name of the person by whom this lienor was em-
ployed, or to whom he furnished or is to furnish ma-
terials, is E. F.

[Or the name of the person with whom the contract
for the improvement herein mentioned was made is
E. F., who contracted with G. H., who in turn con-
tracted with this lienor.]

The labor performed or to be performed, or materials
furnished or to be furnished and the agreed price or
value thereof, is as follows :

[Insert a brief statement, thus : Under and by virtue of a written contract made and entered into (a) with the consent of the owner hereinabove mentioned, on or about July 17, 1896, for the plumbing work and materials, according to the specifications thereto annexed, in the building (b) being erected and situate as herein-after stated, for the sum of four hundred and fifteen dollars, on which there has been paid the sum of one hundred dollars, and also for certain extra plumbing work and materials in and about the said building, ordered by the contractor hereinabove mentioned, with the consent of the owner hereinabove mentioned, of the price and value of one hundred and fifteen dollars, making in all the sum of five hundred and thirty dollars.]

The amount unpaid to this lienor for such labor and material is .

The time when the first item of work was performed and materials furnished was , and the time when the last item of work was performed and materials furnished was . [Or the work has not yet been wholly performed, or the materials have not yet been wholly furnished : And add : and this lienor intends to perform and furnish the remaining portion forthwith ; or, for which remaining portion no claim is made ; or, which remaining portion lienor is prevented by owner from performing or furnishing.]

The property subject to the lien is situate in the Ward of the City of New York, on the side of Street, feet and inches distant from Street, being feet and inches wide, front and rear, by feet and inches in depth on each side, and is known as Number Street and shown on the following diagram :

[Diagram.]

Dated , 1897.

STATE OF NEW YORK, } ss. :
 COUNTY OF }

A. B., being duly sworn, says that he is the lienor mentioned in the foregoing notice of lien, that he has read the said notice and knows the contents thereof, and that the statements therein contained are true, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

A. B.

Subscribed and sworn to be-
 fore me, this day }
 of 1897.

V. W.,
Notary Public,
 ——— *County.*

If the contract was made by an agent of the contractor in the agent's name, insert at (a) "by C. D., agent for this lienor."

If there be more than one contract held by the lienor, recite each separately, one following the other, and mention the total of all the contracts at the close of the paragraph in one lump sum.

If there be several buildings and the contract be a general one for all the buildings, use the word "buildings" at (b) and add at (c) the words "of which the sum of dollars is claimed against the easternmost of the said buildings, the sum of dollars against the middle one of said buildings, and the sum of dollars against the westernmost of said buildings."

ORDER ON OWNER.

To the Clerk of the City and County of New York :

Please file the annexed copy of order in your office pursuant to the provisions of Chapter XLIX., Article I., of the General Laws, known as the Lien Law, and pursuant to the provisions of said act, index the same in the "Lien Docket," provided for in section 10 of said Article I., Chap. XLIX.

Said order affects and was drawn and given for [building sand] furnished towards the improvement of the following described real property situated in the City of New York, on the side of Street
 feet from Street, about
 feet front and rear, by about feet deep on each
 side, and known as Nos. Street.

New York, 1897.

— — — — —,

Claimant.

— — — — —,

Atty. for Claimant.

NEW YORK, 1897.

C. D., Esq. :

DEAR SIR,—Please retain out of my payment,
 when same is due to me on my three houses on the
 side of Street, feet north of
 Street, feet by feet, the sum of
 dollars and pay the same to the order of A. B.

Yours truly,
 E. F.

AFFIDAVIT TO OBTAIN EXTENSION OF LIEN.

SUPREME COURT,
NEW YORK COUNTY.

In the Matter of the Me-	}
chanic's Lien claimed by	
A. B.	
v.	
E. F. as contractor and C.	}
D. and G. H. as owners.	

CITY AND COUNTY OF NEW YORK, ss. :

A. B., being duly sworn, deposes and says : that prior to 1896, I performed the labor and furnished the materials, as required under a contract mentioned in the notice of lien hereinafter referred to, in and about the improvement of the real property situate in the City of New York on the [description].

On 1896, I filed a notice of lien in the office of the Clerk of the City and County of New York, claiming a mechanic's lien pursuant to the provisions of Chapter XLIX., Article I., of the General Laws, known as the Lien Law, for the sum of \$, on account of said labor and materials, as appears by the copy of said notice of lien hereto annexed and made part hereof, and that said lien was duly docketed on 1896.

That said notice of lien was filed within ninety days after the completion of said labor and the furnishing of said materials.

The names of the owners of said land and building are, as stated in said notice, C. D. and G. H. ; and the name of the contractor by whom I was employed and to whom I furnished said materials, as stated in said notice of lien, is E. F.

That there are numerous other liens filed against the said premises, some of which are prior and some subsequent to affiant's lien.

therefor, now, on motion of L. M., attorney for said A. B.,

It is ordered, That the lien claimed by the said A. B. by his notice of lien filed on the day of 1896, at o'clock A. M., upon the following real property and the improvements thereon, to wit: the five houses and lots of land on the northerly side of Street in the Twelfth Ward of the City of New York, distant seventy-five feet east of Madison Avenue, and being collectively one hundred and fifty feet wide, in front and rear, by one hundred feet deep on each side, and separately known as Numbers 53, 55, 57, 59 and 61 East Street, that is to say, \$225 on No. 53, and \$375 on each of the Numbers 55, 57, 59 and 61 East

Street, as aforesaid, of which C. D. and G. H. are alleged to be the owners and said E. F. contractor, for the improvement, to wit, the erection of buildings on such real property, be and the same hereby is continued, pursuant to the provisions of section 16 of Chapter XLIX., Article I., of the General Laws, known as the Lien Law. And the Clerk of the City and County of New York is hereby directed to make a new docket of the said lien hereby continued as of the date of this order in the lien docket kept in his office for that purpose, pursuant to said law, and to note thereon that the said lien is so continued by order of this Court.

AFFIDAVIT TO OBTAIN PAYMENT OF DEPOSIT TO CLAIMANT.

SUPREME COURT,
NEW YORK COUNTY.

A. B., claimant,
v.
C. D., owner,
and E. F., contractor.

}

CITY AND COUNTY OF NEW YORK, ss. :

A. B., being duly sworn, says that he is the claimant named in the notice of lien filed in the office of the Clerk of the City and County of New York on the day of 1896, and that he caused the said notice to be filed in his behalf ; that he has performed the labor and furnished the materials therein mentioned, and that the performing and furnishing thereof was completed less than ninety days prior to said filing, and that he claims a lien therefor in the sum of \$. Annexed hereto is a copy of the said notice of lien.

On the day of 1896, C. D., the owner of said premises, deposited with the Clerk of the City and County of New York the sum of \$ to secure the discharge of said lien from the premises mentioned in said notice, and thereupon the clerk duly entered in the "lien docket " that the said lien had been "discharged by payment."

That said C. D. is now willing that the said fund should be paid over to deponent in payment and satisfaction of his lien, as deponent is informed.

[That G. H., I. J., and K. L., have filed lien claims against the said premises, subsequent to deponent's lien.]

Subscribed and sworn to }
before me, this day }
of 1897.

On return day there should be an affidavit of service of notice of motion and affidavit on G. H., I. J., K. L., as well as on C. D. and E. F.

ORDER DIRECTING PAYMENT OF DEPOSIT TO CLAIMANT.

At a Special Term, Part One thereof,
of the Supreme Court in and for
the City and County of New York,
held at the Court House in said
City, on the day of 1897.

Present : Hon. ————,
Justice.

A. B., claimant,	}
<i>v.</i>	
C. D., owner, and E. F., contractor.	

On reading and filing the notice of motion herein for the day of 1897, and the affidavit of A. B., verified the day of 1897, and proof of due service of copies thereof on C. D., the owner of the premises mentioned therein and on E. F. contractor [and add "and on all the persons having lien-claims against the said premises" ¹] or their respective attorneys, now, on motion of M. N., attorney for A. B., claimant, it is

Ordered, That the City Chamberlain pay and he hereby is directed to pay unto A. B., claimant, or M. N., his attorney, the sum of dollars deposited by C. D., owner, in this proceeding on 1896, together with all interest accrued, less his legal fees.

If possible, have consent of attorney for owner indorsed on foot of order.

¹ See *Scherrer v. Hopper*, 45 State Rep. 638.

AFFIDAVIT FOR ORDER TO FIX AMOUNT OF BOND.

SUPREME COURT,
NEW YORK COUNTY.

In the Matter of the Me-	}
chanic's Lien claimed by	
A. B.	
agst.	}
C. D. as owner and	
E. F. as contractor.	

CITY AND COUNTY OF NEW YORK, ss.

C. D., being duly sworn, says that he is the owner of the premises Nos. Street, in the City of New York, against which the above-named A. B. filed a notice of mechanic's lien in the office of the Clerk of the City and County of New York on the day of 1897, for the sum of dollars, against deponent as owner and E. F. as contractor.

That no action or proceeding has been commenced, on the part of the lienor to enforce or foreclose said lien, and said owner desires to discharge the said lien by bond, pursuant to the statutes of the State of New York in such case made and provided, and deponent asks for an order fixing the amount of such bond, for which order no previous application has been made.

C. D.

Sworn to before me, this }
day of 1897. }

_____,
Notary Public,
N. Y. Co.

ORDER FIXING AMOUNT OF BOND.

At a Special Term, Part Two thereof,
of the Supreme Court in and for
the City and County of New York,
held at the Court House in said city
on the day of 1897.

Present: Hon. ————, *Justice.*

In the Matter of the Me-	}
chanic's Lien claimed by	
A. B.	
<i>v.</i>	
C. D., owner, and E. F.,	}
contractor.	

On reading and filing the annexed affidavit of C. D., owner, and on motion of , attorney for said owner, it is

Ordered, That the sum of dollars be and the same hereby is fixed as the amount of a bond to be given by C. D., owner, to discharge the mechanic's lien filed against said C. D. as owner and E. F. as contractor, in the office of the Clerk of the City and County of New York on the day of 1897, for the sum of dollars, and against the real property and improvements therein described known as Nos. Street, New York City.

BOND.

Know all men by these presents, That we, C. D., as owner, and M. N., residing at , in the City of

New York, and O. P., residing at _____, in the City of New York, as sureties, are held and firmly bound unto the Clerk of the City and County of New York, his successors or assigns, in the penal sum of _____ dollars, for which payment well and truly to be made, we do bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, dated this _____ day of _____ 1897.

Whereas, A. B. filed with the Clerk of the City and County of New York, on the _____ day of _____ 1896, a notice of mechanic's lien for _____ dollars, against the above named C. D., as owner, and E. F., as contractor, and against the real property and improvements on the _____ side of _____ Street, in the City of New York, distant _____ feet west of _____ Avenue, and running thence westerly one hundred feet, being one hundred feet in front and rear and in depth on each side one hundred feet and know as Nos. _____

Street, in the City of New York.

Now the condition of the above obligation is such that if the above bounden C. D., his heirs, executors or administrators, shall well and truly pay any judgment that may be rendered against said property in any proceeding to enforce said lien, then this obligation to be void, otherwise to remain in full force and virtue.

C. D. [SEAL.]

M. N. [SEAL.]

O. P. [SEAL.]

CITY AND COUNTY OF NEW YORK, ss. :

M. N., being duly sworn, says that he is one of the sureties executing the foregoing bond ; that he is a resident and freeholder within the State of New York, and is worth double the amount of said bond, over and above all the debts and liabilities which he owes or has incurred and

exclusive of property exempt by law from levy and sale under an execution.

M. N.

Sworn to before me, this }
day of 1897. }

CITY AND COUNTY OF NEW YORK, ss. :

O. P., being duly sworn, says that he is one of the sureties executing the foregoing bond : that he is a resident and freeholder within the State of New York, and is worth double the amount of the said bond, over and above all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

O. P.

Sworn to before me, this }
day of
1897. }

CITY AND COUNTY OF NEW YORK, ss.

On this day of 1897, before me personally came C. D., M. N. and O. P., known to me to be the individuals described in, and who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

To A. B., *Lienor* :

Take notice that the foregoing bond will be presented for approval and the sureties therein named will attend and justify before the Hon. _____, one of the justices of the Supreme Court, sitting in Special Term, Part II., in the County Court House, in the City of New York, on the day of 1897, at 10.30 o'clock A. M.

Dated, New York, 1897.

_____,
Attys. for C. D., Owner,
Street, New York, N. Y.

The sureties having justified before me, the foregoing bond is hereby approved as to form and sufficiency of sureties.

N. Y., 1897.

H. R. B.,
J. S. C.

Or,

The lienor above-named having been twice called, to-wit, at 10.30 and 11.00 A. M. on this day, and having failed to appear, his default is noted, and the foregoing bond is hereby approved as to form and sufficiency of sureties.

N. Y., 1897.

H. R. B.,
J. S. C.

(Affidavit of service of notice.)

ORDER DISCHARGING LIEN ON BOND FILED.

At a Special Term of the Supreme Court, Part Two thereof, in and for the City and County of New York, held at the Court House in said City on the day of
1897.

Present: Hon. ———,
Justice.

In the Matter of the Me-	}
chanic's Lien claimed by	
A. B.	
v.	
C. D. as owner	
and E. F. as contractor.	}

An order having been made herein on 1897,
fixing the sum of dollars as the amount of the

bond to be given by the above-named owner to discharge the mechanic's lien filed by the above-named lienor in the office of the Clerk of the City and County of New York on 1897, for the sum of against said C. D. as owner and E. F. as contractor and against the real property and improvements hereinafter described, and said owner, together with M. N. and O. P. as sureties, having duly executed said bond in the required sum of \$, which said bond is in the form required by law and is duly verified by said sureties as required by law, and a copy of said bond and a notice that the sureties therein named would attend and justify before Hon. , one of the justices of this court at Special Term, Part II. of this court, on 1897, at 10.30 o'clock A. M., having been duly served upon said lienor, as appears by the affidavit of affixed to said bond, and said lienor having appeared by , Esq., his attorney, and having examined the said sureties [or, and said lienor having failed to appear at the time and place mentioned in said notice and his default having been noted at the foot of said bond], and said sureties having justified and said bond having been thereupon approved as to form and sufficiency of sureties by Hon. sitting in Special Term, Part II. of this Court, now on motion of attorney of C. D., owner, it is

Ordered, That upon the filing of said bond bearing date 1897, with the Clerk of the City and County of New York, which said bond is in the form required by law and is duly acknowledged and contains the required affidavit of the sureties therein named, and is duly approved as to form and sufficiency of sureties by Hon.

the said mechanic's lien filed by A. B. on 1897, in the office of the Clerk of the City and County of New York for the sum of \$ against said C. D., owner, and E. F., contractor, and against the real property and improvements on the side of Street in the City of New York feet west of Avenue and thence running westerly feet, being

feet in front and rear, and in depth on each side
feet and being known as Numbers Street in the
City of New York, be and the same hereby is cancelled
of record and said clerk is hereby directed to mark the
docket of said lien cancelled of record with a reference
to this order thereon.

NOTICE TO COMMENCE ACTION TO ENFORCE CLAIM OR SHOW
CAUSE WHY NOTICE OF LIEN SHOULD NOT BE VACATED
AND CANCELLED OF RECORD.

SUPREME COURT,
NEW YORK COUNTY.

In the Matter of the Lien	}
claimed by	
A. B.	
v.	
C. D. as owner	
and E. F. as contractor.	}

To A. B., *Lienor* :

Take notice you are hereby required to commence
an action to enforce the lien claimed by you in your
notice of lien filed in the office of the Clerk of the City
and County of New York on 1897, for the sum
of \$, against C. D. as owner and E. F. as con-
tractor and against the real property and improvements
on the side of Street in the City of New
York, distant feet westerly from Avenue,
and running thence feet westerly, being
feet wide in front and rear and in depth on each side
feet and known by the Number Street,
on or before 1897 [not less than 30 days from the
service of this notice] or to show cause at a Special Term,
Part One thereof, of the Supreme Court, in and for the
City and County of New York, at the Court House in
said City on the day of 1897, at 10.30

o'clock A. M., or as soon thereafter as counsel can be heard, why the said notice of lien filed by you, as aforesaid, on the day of 1897, should not be vacated and cancelled of record, and for such other and further relief as to the Court may seem just.

Dated New York, 1897.

C. D.,

Owner.

V. W.,

Attorney for Owner.

ORDER VACATING LIEN FOR FAILURE TO PROSECUTE.

At a Special Term of the Supreme Court, Part One thereof, in and for the City and County of New York, held at the Court House in said city, on the day of 1897.

Present : Hon. ———, *Justice.*

In the Matter of the Mechanic's Lien claimed by	}
A. B.	
<i>v.</i>	
C. D. as owner and E. F. as contractor.	

On reading and filing the notice to A. B., lienor, dated 1897, and filed herewith, and the affidavit of verified 1897, showing due service of said notice pursuant to the provisions of section 3417 of the Code of Civil Procedure, and the A. B. having failed to appear and show cause as required, and it further appearing by the affidavit of verified this day that no action to enforce the said lien-claim has been commenced

by the filing of a notice of pendency of action or the service of a summons and complaint on C. D., owner, now on motion of _____, attorney for said C. D., owner, it is

Ordered, That the said notice of lien filed by A. B. on the _____ day of _____ 1897, for the sum of \$ _____, against C. D. as owner and E. F. as contractor and against the real property and improvements on the _____ side of _____ Street, in the City of New York, distant _____ feet westerly from _____ Avenue and running thence _____ feet westerly, being _____ feet wide in front and rear and in depth on each side _____ feet, be and the same hereby is vacated and cancelled of record, and the Clerk of the City and County of New York is hereby directed to mark the docket of said lien vacated and cancelled of record with a reference to this order thereon.

LIS PENDENS.

SUPREME COURT,
NEW YORK CITY.

A. B., v. C. D., E. F., G. H., Dfts.	}	Plff., Dfts. Notice of Pendency of Action.
--	---	--

Notice is hereby given, that an action has been commenced and is pending in this Court upon a complaint of the above-named plaintiff against the above-named defendants for the foreclosure of a certain notice of claim of Mechanic's Lien, for the sum of \$ _____, filed by the plaintiff and docketed in the office of the Clerk of the City and County of New York, on the _____ day of _____ 189____, in which the defendant C. D. is named as owner and the defendant E. F. as contractor, and

against the real property and improvements hereinafter described [and also Nos. Street since released].

That the premises affected by the said action were at the time of the commencement thereof, and at the time of the filing of this notice, situate in the Ward of the City of New York, in the County and State of New York, and are described as follows, to wit :

Beginning at a point on the side of Street, distant feet and inches from the corner of Street ; running thence feet and inches, thence feet and inches, thence feet and inches, and thence feet and inches to the point or place of beginning, be the said several dimensions and distances more or less, together with the building and appurtenances thereon.

Said premises being known as Nos. Street in the City of New York.

[Balance due \$ with interest from .]
New York, 1897.

_____,
Plff.'s Attorney,
New York City.

The Clerk of the City and County of New York is directed to index this notice to the names of defendants.

_____,
Attys. for Plaintiff.

(Endorse location on land map.)

OFFER TO DEPOSIT MONEY, ETC., AFTER SUIT BEGUN.

SUPREME COURT,
NEW YORK COUNTY.

A. B.,
v.
C. D., E. F., and G. H. }

Take notice that C. D., defendant above-named, and owner of the real property and improvements against which the lien to enforce which this action is brought, is filed, hereby offers to pay into court the sum of \$ [or, to deposit the following securities, to wit, . . . or, to execute and deposit a bond in the sum of \$, with two good and sufficient sureties, conditioned for the payment of any judgment which may be recovered against the real property and improvements in the said notice of lien and complaint herein described] in discharge of the lien claimed by A. B., the plaintiff herein [or, if a defendant lienor has set up his lien affirmatively, then "by S. T. defendant herein"], filed in the office of the Clerk of the City and County of New York on the day of 1896, against C. D. as owner and E. F. as contractor, and against the real property and improvements described in the complaint herein.

Dated New York, 1897.

C. D.,
Owner.

To A. B.,
Plaintiff and Claimant.

_____,
Attorney for Owner.

_____,
Atty. for Plaintiff.

ACCEPTANCE OF OFFER.

(Title.)

A. B., plaintiff and claimant herein [or S. T., defendant and claimant herein], hereby accepts the offer of C. D., owner and defendant herein, to pay into court the sum of \$ _____ [or, as in the offer], in discharge of the lien of A. B. [or of S. T.], filed _____ 1896, and now being enforced in this action.

Dated New York, _____ 1897.

A. B.,
Plaintiff and Claimant.

To C. D., _____,
Owner. *Atty. for Plff.*

_____,
Atty. for Owner.

ORDER DISCHARGING LIEN ON ACCEPTANCE OF OFFER.

At a Special Term, Part Two thereof,
of the Supreme Court, in and for
the City and County of New York,
held at the Court House, in the
said City, on the _____ day of
1897.

Present: Hon. _____,
Justice.

A. B. }
v. }
C. D. *et al.*

On reading and filing the offer of C. D., owner and defendant herein, dated _____ 1897, addressed to A. B., plaintiff and claimant herein [or S. T., defendant and claimant herein], and filed herein on the _____ day of _____, offering to pay into court the sum of \$ _____

[or, as in the offer], in discharge of the said lien claimed by A. B. [or S. T.], and the acceptance of said offer by A. B. [or S. T.], dated 1897, and filed herein on the day of 1897, now on motion of , attorney for C. D., owner and defendant, it is

Ordered, That upon the deposit by said C. D., owner and defendant, of the sum of \$ with the Clerk of the City and County of New York [or upon the deposit by said C. D., owner and defendant of the following securities, to wit, * * * * * with the Clerk of the City and County of New York ; or upon the execution and deposit by the said C. D., owner and defendant herein, of a bond to the said Clerk in the sum of \$ conditioned for the payment of any judgment which may be recovered in favor of A. B. [or S. T.], against the real property and improvements described in the complaint herein, with two good and sufficient sureties, to justify upon notice and said bond to be approved by the Court] the said lien filed by A. B. [or S. T.], for the sum of \$, in the office of the Clerk of the City and County of New York on the day of 1896, against C. D. as owner and E. F. as contractor and against the real property and improvements situate on the side of Street in the City of New York, distant feet from Avenue, and thence running westerly feet, being feet wide in front and rear and in depth on each side feet and known by the numbers Street in said city, he and the same hereby is discharged, and the Clerk of said City and County is hereby directed to mark the docket of said lien discharged and cancelled of record with a reference to this order thereon.

And it is further ordered, That the said sum of \$ so deposited with the said Clerk [or, as above] take the place of the real property and improvements upon which the said lien was created by the filing of the said notice by A. B. [or S. T.] on the day of 1896, and that it be subject to said lien in lieu of said real

property and improvements, to the same extent that the said real property and improvements would be subject thereto, had this order not been made.

ORDER TO SHOW CAUSE WHY ACTIONS SHOULD NOT BE
CONSOLIDATED.

CITY COURT OF NEW YORK :

A. B. }
 v. }
M. S. *et al.* }

Upon the annexed affidavits of and
with the papers thereto attached,

It is ordered, That A. B. (plaintiff) and C. D., E. F., G. H. [all the parties to the suits in question], or their respective attorneys, show cause at a Special Term of this Court to be held in the City Hall in the City of New York on the 1897, at 10.30 A.M. on that day, or as soon thereafter as counsel can be heard, why the action of C. D. *et al v.* M. S. *et al.*, now pending in this Court, and the action of E. F. against M. S. *et al.*, now pending in the Supreme Court of the State of New York, should not be consolidated with this action, and why the said M. S. should not have such other and further or different relief in the premises as may be proper.

Dated New York, 1897.

AFFIDAVIT ON ABOVE ORDER TO SHOW CAUSE.

(Title.)

CITY AND COUNTY OF NEW YORK, ss. :

M. S., being duly sworn, says that he is the owner of the real property and improvements in the City of New

York known as Nos. , and was such owner at the times hereinafter mentioned.

That defendant I. J. caused to be filed in the office of the Clerk of the City and County of New York on 1897, a certain paper purporting to be a mechanic's lien upon the said real property and improvements for \$, asserting a lien upon the said premises against the interests therein of deponent.

[Similar recitals for all liens filed.]

That on 1897, A. B., by , Esq., his attorney, commenced this action against deponent and others as defendants: that a copy of the summons and complaint is hereto annexed; that deponent has appeared by , Esq., as his attorney, and has answered [or his time to answer or demur has been extended].

That on 1897, C. D. commenced an action in this Court by , Esq., his attorney, against deponent and others for the purpose, among other things, of foreclosing the said alleged mechanic's lien; that a copy of the summons and complaint therein is hereto annexed as a part of this affidavit; that deponent has appeared in said action by , Esq., his attorney, and that his time to answer or demur therein has been extended to

[Similar recitals as to other suits to foreclose liens against M. S. on said premises in any Court.]

That the deponent desires to defend the alleged cause of action set forth in the complaints in the said several actions upon the ground [recite it briefly].

That all the issues raised or to be raised in the several actions and the rights of all the parties thereto can be litigated and determined in one action; and that unless the actions above referred to be consolidated, deponent will be subjected to great and unnecessary expense in defending [three] actions, and will be hindered and injured by a multiplicity of suits.

That all the parties to said several actions have appeared by their respective attorneys as follows :

No previous application, etc.

Sworn to before me, this }
 day of }
 1897. }

[Summons and complaints in the several actions annexed.]

ORDER CONSOLIDATING ACTIONS.

At a Special Term of the City Court of
 New York held at the City Hall in
 said City on the

Present : Hon. ———, *Justice.*

A. B. }
 v. }
 M. S. *et al.* }

The defendant M. S. having moved upon the return of the order to show cause made herein by Mr. Justice that the action of C. D. against M. S. *et al.* now pending undetermined in this Court and [recite other actions to be consolidated] should be consolidated with this action, now on reading and filing the said order to show cause and the annexed affidavits of ; the affidavit [recite all filed] , and it appearing therefrom to the satisfaction of the Court that each of said actions is brought to foreclose a mechanic's lien upon the same premises, and that the defendant M. S. is the owner thereof, and that this action was commenced in this Court at a date prior to the commencement of the other actions.

And after hearing

Now on motion of _____, attorney for the defendant M. S., it is

Ordered, That the action brought in this court by C. D. as plaintiff against M. S. and [recite them] as defendants be and it hereby is consolidated with this action ; and it is further

Ordered [similar recitals for other actions], and it is further

Ordered, That the several statements of the causes of action, defenses, counter-claims, defenses and replies already made in the pleadings in said actions stand as the statements thereof, in the said consolidated action ; and that all further proceedings in this action shall be under the title of A. B., C. D. and E. F. [all the plaintiffs], against M. S. and [other defendants in all actions] ; and that such defendants as have appeared and have not answered in the said several actions shall serve their respective answers in this consolidated action upon the respective attorneys for the various plaintiffs in this consolidated action within days after service of a copy of this order on their respective attorneys ; and that when issues have been joined, as herein provided, this action shall proceed to trial upon a notice of trial on the part of either of the plaintiffs herein. And it is further

Ordered, That this order be and the same hereby is granted without prejudice to the right to costs and allowances on the part of either or all of the respective plaintiffs in this consolidated action.

COMPLAINT.

SUPREME COURT,
NEW YORK COUNTY.

A. B.,	}	Contractor <i>v.</i> Owner.
Plaintiff,		
<i>v.</i>		
C. D., G. H., I. J., etc.,		
Defendants.	}	

The plaintiff above-named complains to this Honorable Court and avers :

I. Upon information and belief that at the times hereinafter mentioned the defendant C. D. was the owner in fee of the following described real property [give description in full], and said defendant was at the times hereinafter stated [and still is] engaged in the making of certain improvements thereon to wit, the erection [or alteration or repair] of certain buildings and dwelling-houses upon said above-described real property.

II. That on or about the day of 1897 [or between the day of 1897, and the day of 1897], plaintiff entered into an agreement [in writing] with the defendant C. D., wherein and whereby this plaintiff agreed [give substance of contract, *e. g.*, to sell and deliver to defendant C. D. certain goods, wares and merchandise, consisting of doors, sashes, blinds and other building materials] at the agreed price or sum of dollars; and that subsequently plaintiff sold and delivered the said goods, wares and merchandise to defendant C. D.

III. That prior to the day of 1897, plaintiff sold and delivered to the defendant C. D., at his request, certain other building materials not included in said contract, of the reasonable value and for which he agreed to pay the sum of dollars.

IV. That said goods, wares and merchandise and building material were sold and delivered by said plain-

tiff to said defendant C. D., for the purpose of being used in the improvement aforesaid, to wit, the erection and construction [or alteration and repair] of certain buildings upon the real property hereinbefore described, and were actually used by said defendant C. D. in the erection and construction thereof.

V. That no part of said sum of \$ has been paid, except the sum of \$ which has been paid on account thereof, leaving due and owing to this plaintiff the sum of \$.

VI. That on the day of 1897 [and after the said sum of \$ had become due and payable], and within 90 days after the final furnishing of the said material, this plaintiff caused to be filed in the office of the Clerk of the City and County of New York, a notice of claim and lien, in writing, for the amount of the value of the material aforesaid [less the part payment above mentioned], to wit, the sum of \$, which notice was duly verified, and specified the name and residence of this plaintiff as lienor, the name of the owner and his interest therein, as far as known to the lienor, and the name of the person by whom plaintiff was employed and to whom this plaintiff furnished the material aforesaid, together with a statement of the material for which the claim was made, and the agreed price or value thereof and the amount unpaid to this plaintiff for such materials, and the time when the first and last items of materials were furnished ; and it also contained a description of the property subject to the lien sufficient for identification, which is the same property charged as described in this complaint, and that the said notice also contained all other statements required by, and in all respects complied with the statute of the State of New York in such case made and provided.

That said lien and claim was thereupon on said day of 1897, duly docketed by said clerk in the lien docket kept by him in his office for that purpose, and thereafter on the day of 1897, a copy

thereof was in pursuance of said statute, duly served upon the defendant C. D.

VII. That said lien and claim has not been paid, cancelled or otherwise discharged, and no other action or proceeding has been brought by this plaintiff for the foreclosure of the same, or for the recovery of the moneys intended to be secured thereby.

VIII. That the defendants G. H., I. J., etc., have filed mechanics' liens against the above described premises.

IX. That the defendants K. L., S. T., etc., have no claim to have some interest in, lien or claim upon the above described real property and improvements, or some part thereof, other than claims under the Mechanic's Lien Law, which interest, claim or lien, if any, is subject and subordinate to the lien and claim of this plaintiff.

X. That no person, firm, corporation or association, except as hereinbefore mentioned, has filed mechanic's lien against said premises, or have subsequent liens or claims thereon by conveyance, mortgage, judgment, decree or otherwise.

Wherefore plaintiff demands judgment.

1. That the amount due upon his lien and claim for principal and interest be ascertained, determined and adjudged.

2. That the right, interest and priorities of this plaintiff and all the defendants be ascertained, determined and adjudged.

3. That this plaintiff be adjudged to have a valid and subsisting lien upon the interest of the owner C. D. in the premises aforesaid, as of the date of filing the said lien, to wit : 1897, for the sum of \$ and interest thereon from the 1897, and the costs and disbursements of this action.

4. That the defendants, and each of them, and all persons claiming under them or any of them subsequent to the filing of the notice of the pendency of this action in the office of the Clerk of the City and County of New York, in which the lands and premises described in this

complaint are situated, be barred and foreclosed of all right, claim, lien and equity of redemption in and to the lands and real property and improvements aforesaid.

5. That the real property and improvements be sold according to law and the rules and practice of this court.

6. That the moneys arising from the sale be brought into court.

7. That this plaintiff may be paid out of such proceeds the amount due him, with interest to the time of such payment, the expenses of the sale, and the costs and expenses of this action, so far as the amount properly applicable thereto will pay the same, and that the defendant C. D. Δ be adjudged to pay any deficiency which may remain after applying all of the said moneys properly applicable thereto.

8. That this plaintiff may have such and further judgment, order or relief as may be just.

— — — — —,

Attorney for Plaintiff.

(*Verification*).

A.

IF CONTRACT IS NOT FULLY PERFORMED.

Substitute for II. and III. in Contractor's Complaint, the following :

That on or about 1897, plaintiff entered into an agreement with defendant C. D., wherein and whereby this plaintiff agreed to furnish all the building sand required by the defendant C. D., to complete the buildings on said above described real property for the price or sum of \$.

That thereupon this plaintiff entered upon the performance of said agreement and furnished certain of the

building sand required by the defendant C. D., in the erection and construction of said building, and continued therein until defendant C. D. ceased work upon said building and directed this plaintiff to cease the furnishing of said building sand.

That the reasonable value of building sand so furnished by this plaintiff is the sum of dollars.

That this plaintiff, with the exception above stated, has duly performed, observed and fulfilled all the conditions of said agreement on his part agreed to be performed, observed and fulfilled, and has always been and is now ready and willing and hereby offers to furnish the balance of the building sand required for use in the completion of the buildings in the course of erection upon the lands above described.

(Then as in Contractor's Complaint IV.)

In sub-contractor's complaint use above form, but substitute E. F. for C. D.

COMPLAINT BY SUB-CONTRACTOR.

SUPREME COURT,
NEW YORK COUNTY.

A. B.,	} Plff., v. C. D., E. F., G. H., etc., Defts.

The plaintiff above-named complains to this Honorable Court and avers :

I. Upon information and belief that at the times hereinafter mentioned the defendant C. D. was the owner in fee of the following described real property [full description].

II. That heretofore and prior to [date of sub-contract]

said defendant C. D. entered into an agreement with defendant E. F. [give substance of contract with chief contractor].¹

III. That thereafter and on or about the day of 1897, this plaintiff entered into an agreement [in writing] with defendant E. F. [give substance as in Contractor's Complaint II. and III. ; or under A., substituting E. F. for C. D.]

IV. That said [goods, wares and merchandise] were sold and delivered by plaintiff unto defendant E. F. with the knowledge and consent of defendant C. D., the owner of said real property and improvements, for the purpose of being used in the erection and construction [or alteration and repair] of certain buildings upon the real property hereinbefore described, and were actually used by said defendant E. F. with the knowledge and consent of defendant C. D. in the erection and construction thereof.

V., VI., VII., VIII., IX., X., as in Contractor's Complaint V., VI., VII., VIII., IX., X.

XI. That E. F. has performed his contract with C. D. [or that E. F. has so far performed his contract with C. D. that he is entitled to receive thereunder the sum of \$], and that there is now due and payable from C. D. to E. F. and applicable to the payment of plaintiff's lien a sum more than sufficient to satisfy and discharge the same.

Demand as in contractor's complaint, except at Δ substitute E. F. for C. D.

B.

AGAINST SURETIES ON BOND.

When lien has been bonded, add

XII. That on the day of 1897, defendant C. D. filed in the office of the Clerk of the City and

¹ This information may be demanded of the owner. See *ante*, p. 8.

County of New York a bond wherein said defendant C. D. as the principal, and defendants M. N. and O. P. as the sureties, are held and firmly bound unto Henry D. Purroy as Clerk of the City and County of New York, his successors and assigns, in the sum of \$, conditioned for the payment of any judgment which may be rendered against the premises hereinbefore described at the suit of this plaintiff; and the amount of said bond having been first duly fixed by a justice of this Court and the sureties thereon having duly justified before said justice, an order of this Court was duly made and entered, directing that upon the filing of said bond as aforesaid, the lien claimed by this plaintiff be discharged from the said premises and substituting said bond as security for said lien and claim, in lieu of the said premises.

Follow the demand for judgment as in contractor's complaint, except that after 7 insert the following :

8. Or that instead of such sale and distribution the plaintiffs recover of the defendants C. D., M. N. and O. P. [if action is by sub-contractor, add E. F.] the amount due him with interest to the time of payment, together with his costs and disbursements of this action.

C.

AFTER DEPOSIT MADE.

When deposit has been made, add

XII. That on the day of 1897, defendant C. D. paid into the hands of the Clerk of the City and County of New York the sum of \$, being the amount claimed by the plaintiff in his notice of lien aforesaid, with interest thereon to the time of such deposit, and thereupon the said lien was marked in the lien docket "discharged by payment" by the said County

Clerk, pursuant to the provisions of the statute in such case made and provided.

Follow the demand for judgment as in contractor's complaint, except that in lieu of 5, 6 and 7 substitute the following :

5. That out of the sum of \$ paid by defendant C. D. unto the Clerk of the City and County of New York on the day of 1897, this plaintiff recover the amount due him with interest to the time of payment, and that the Chamberlain of the City of New York be directed to pay over the said sum and interest accrued thereon, or so much thereof as may be necessary, to this plaintiff.

6. That if said sum be insufficient therefor, that plaintiff have judgment for such deficiency against defendant C. D. [and if action be by sub-contractor, add, and E. F.].

7. That this plaintiff be paid his costs and disbursements of this action out of said sum in the hands of the City Chamberlain, if the same be sufficient therefor, and if not that he recover said costs and disbursements of the defendant C. D. [if action be by sub-contractor, add, and E. F.].

D.

If a note has been given, substitute for V. in the contractor's complaint the following :

V. That thereafter and on or about the day of 1897, defendant C. D. [or E. F., as the case may be] made his certain promissory note in writing, dated on that day, wherein he promised to pay to the order of this plaintiff the sum of \$, three months after date, at the Bank, for value received, said value consisting of the materials aforesaid, and delivered the same to this plaintiff. [If there be an endorsement set it forth, and the consideration for the

endorsement.] That said note is now past due and payable, but the same has not been paid, or any part thereof ; that when the same became due and payable, to wit, on the day of 1897, the same was duly presented by the plaintiff at Bank, the place where the same was payable, and payment thereof was duly demanded and refused ; whereupon said note was duly protested for non-payment [and due notice of such protest was given to the endorser, defendant]. Plaintiff is ready and willing to surrender said note upon the trial hereof.

E.

If there be a fraudulent conveyance or encumbrance, complaint may ask to have it set aside.

ANSWER.

By subsequent lienor, not admitting complaint, and merely setting up lien affirmatively.

(Title.)

The defendant for answer to the complaint of the plaintiff herein :

For a first defense :

Admits the allegations contained in paragraphs of the complaint marked [alleging ownership and other lienors].

Denies any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs of the complaint numbered [containing assertions of plaintiff's claim].

For a second defense :

Proceed as if it was a complaint and demand judgment as if it was a complaint, *mutatis mutandis*.

ANSWER OF OWNER.

Any defence, by way of counter-claim, may be set up, which could be set up against the complaint, regarded as a complaint upon the contract.

ANSWER BY CONTRACTOR AGAINST SUB-CONTRACTOR.

As above, *mutatis mutandis*.

JUDGMENT.

At a Special Term, Part III. thereof,
of the Supreme Court in and for
the City and County of New York,
held at the Court House in said
City on the day of ,
1897.

Present : Hon. ————,
Justice.

A. B.,	}
Plaintiff,	
v.	
C. D., E. F., G. H., etc.,	
Defendants.	

This action having been brought for the foreclosure of a mechanic's lien and the issues therein having been duly

tried by the Court [if there has been a reference, say, and the issues therein having been referred to M. L., Esq., as referee to hear and determine the same by order duly made and entered herein, bearing date 1897, and the said referee having duly made his report dated 1897, and which has been duly filed in the office of the Clerk of the City and county of New York, on the 1897; and if there has been a jury trial, insert as at A., *post*].

And the plaintiff's costs having been duly taxed at the sum of \$, and the costs of the defendant having been duly taxed at \$ [if there has been an extra allowance, recite it here].

Now on motion of , plaintiff's attorney, it is

[*Ordered*, That the report of the referee be and it hereby is confirmed; or if there has been a jury trial, as at A., *post*.]

Ordered, That the plaintiff recover of [if the plaintiff be the contractor, insert the owner's name; if he be the sub-contractor, insert the contractor's name], the sum of \$ and the sum of \$ costs [and allowance], amounting in the aggregate to \$, and that he have execution therefor.

That plaintiff on 1897, by filing the notice of mechanic's lien mentioned and described in the complaint, acquired a good, valid and subsisting lien against the real property and improvements hereinafter described for said last mentioned sum, and judgment is hereby rendered in favor of plaintiff against said real property and improvements for said sum.

[If a defendant's lien, set up affirmatively in his answer, has been sustained by the Court or Referee, say

On motion of , attorney for defendant , it is further

Ordered, That the defendant recover (as above).]

It is further

Ordered, adjudged and decreed That the defendants and each of them and all persons claiming under them,

be barred and foreclosed of all right, claim, lien or equity of redemption in the real property and improvements hereinafter described; that said premises [or if "owner's" interest be less than the fee, that the right, title and interest of the defendant C. D. as the same existed on the day of 1896 (the date of the first lien), in the said premises], be sold according to law, under the direction of the Sheriff of the City and County of New York [or of , Esq., who is hereby appointed Referee for that purpose]; that said Sheriff [or Referee] give notice of the time and place of such sale according to law; that out of the proceeds of the sale, after deducting the expenses thereof, plaintiff be paid the sum of \$ with interest from the date hereof; that next out of said proceeds, the defendant be paid the sum of \$, with interest from the date hereof [and so on in order of priority]; that the surplus, if any, be brought into this court, there to await the further order of the court, and that if the proceeds of the said sale be insufficient to pay said amounts adjudged due; that the plaintiff and defendants have judgment for the deficiency against defendants [the persons liable on the respective contracts].

The following is a description of the said property [insert as in complaint].

A.

This action having been brought for the foreclosure of a mechanic's lien and upon the demand of the the Court having framed certain issues, as appears by an order entered herein 1897, for trial by a jury; and a trial thereof having been had on the day 1897, before Mr. Justice and a jury, as appears by the certificate of the Clerk of the Court, certifying that the jury answered the questions as stated in said certificate; and the remaining issues

having been duly tried by the Court; and the plaintiff's costs having been taxed, etc.

Now on motion of _____, plaintiff's attorney, it is

Ordered, That the said special verdict be and it hereby is adopted by the Court; and it is further

Ordered, etc.

JUDGMENT.—OWNER AGAINST CONTRACTOR.

Enter judgment as in action upon contract and add :

And it is further ordered that the Clerk of the City and County of New York mark the mechanic's lien filed in his office on the _____ day of _____ 1896, by A. B. against C. D. as owner, and E. F. as contractor, for the sum of \$ _____, and against the premises [describe them as in notice of lien] "discharged" in the "lien docket" kept in his office, with a reference thereon to this judgment.

JUDGMENT AFTER BOND GIVEN.

After recitals as to costs, add :

And it appearing to the satisfaction of the Court that the plaintiff's mechanic's lien, to foreclose which this action has been brought, has been discharged by a bond given in pursuance of an order of this Court and filed in the office of the Clerk of the City and County of New York, and that the mechanics' liens of the defendants _____ and _____ have also been discharged in the same manner.

Now, on motion of _____, plaintiff's attorney, it is

Ordered, That plaintiff on _____ 1897, by filing the notice of mechanic's lien mentioned and described in

the complaint, acquired a good, valid and subsisting lien against the real property and improvements hereinafter described for the sum of \$ in favor of the plaintiff against said real property and improvements.

[If a defendant's lien, set up affirmatively in his answer, has been sustained by the Court or Referee say :

On motion of , attorney for defendant , it is further

Ordered, That the defendant, by filing the notice of mechanic's lien, etc., as above.]

It is further ordered, adjudged and decreed, That the defendants and each of them, and all persons claiming under them, be barred and foreclosed of all right, claim, lien or equity of redemption in the premises hereinafter described ; that said premises [or if "owner's" interest be less than the fee, that the right, title and interest of defendant C. D. as the same existed on the day of 1896 (the date of the first lien) in the said premises] be sold according to law, under the direction of the Sheriff of the City and County of New York ; that said Sheriff give notice of the time and place of such sale according to law ; that out of the proceeds of the sale, after deducting the expenses thereof, plaintiff be paid the sum of \$ with interest from the date hereof ; that next out of said proceeds the defendant be paid the sum of \$, with interest from the date hereof [and so on, in order of priority].

And it is further ordered, That this judgment, as far as the enforcement of said liens is provided against the real property hereinafter described, is in form only for the purpose of satisfying the condition of the said bond.

And it is further ordered, That the plaintiff recover of the defendants C. D. [the owner], M. N. and O. P. [sureties], [and if action is by sub-contractor, add E. F. the contractor or any body liable on the contract] the sum of \$ together with \$ costs and disbursements [and allowance], and that he have execution therefor.

[Similar recitals for defendants entitled to affirmative relief.]

The following is a description of the said property :

JUDGMENT AFTER DEPOSIT MADE.

After recitals as to costs, say :

And it appearing to the satisfaction of the Court that the plaintiff's mechanic's lien, to foreclose which this action has been brought, has been discharged by deposit of the sum of \$ with the Clerk of the City and County of New York.

And it further appearing that the said sum with the interest accrued thereon now amounts to the total of \$

Now, on motion of , attorney for plaintiff, it is
Ordered, That the plaintiff on 1897, by filing the notice of mechanic's lien mentioned and described in the complaint, acquired a good, valid and subsisting lien against the premises hereinafter described for the sum of \$ in favor of the plaintiff against the said premises.

[If a defendant's lien, set up affirmatively in his answer, has been sustained by the Court or Referee, say :

On motion of , attorney for defendant , it is further

Ordered, That the defendant by filing the notice of mechanic's lien, etc.]

It is further ordered, That the City Chamberlain pay to the plaintiff the sum of \$ out of the sum deposited with the Clerk of the City and County of New York as aforesaid, and the interest accrued thereon.

[If this be insufficient, add : And that the plaintiff recover of (the person liable to him on contract) the sum of \$, being the deficiency after the above ordered payment be made.]

NOTICE OF MECHANIC'S LIEN ON PUBLIC IMPROVEMENT.

To [HON. CHARLES H. T. COLLIS,
Com'r of Public Works, N. Y. City.]
 and [HON. ASHBEL T. FITCH,
Comptroller of the City of New York.]

Please take notice that A. B., residing at No. , Street, in the City of New York, has and claims a lien for the principal and interest of the value or agreed price of the labor and materials hereinafter mentioned, upon the moneys of the [City of New York], applicable to the construction of the public improvement hereinafter mentioned, pursuant to the provisions of Article I of Chapter XLIX of the General Laws of the State of New York.

The name of the contractor for whom the labor was performed and the materials furnished is C. D. [or, the name of the contractor for the said public improvement is C. D. and the name of the sub-contractor for whom the labor was performed and the materials furnished is E. F. ; or the name of the contractor (or sub-contractor) * * * is not accurately known to the lienor, but he believes it to be C. D. (or E. F.)].

The amount claimed to be due or to become due is \$.

The date when the said sum became due or will be due is .

The public improvement upon which the labor was performed and materials expended is [*e. g.* the construction of a sewer upon Street, from Street to Street in the City of New York].

The kind of labor performed and materials furnished by the lienor is [*e. g.* the excavation for said sewer and the furnishing of building sand therefor].

The contract pursuant to which said public improvement was constructed or is being constructed was made between the [City of New York] and C. D. [for the construction of a brick sewer under Street, from

Street to Street in the City of New York,
including the excavation for said sewer and the relaying
of the pavement upon said Street, according to the speci-
fications therefor, for the sum of].

Dated 1897.

A. B.,
Lienor.

(No verification is required under the act.)

AFFIDAVIT FOR ORDER TO FIX AMOUNT OF DEPOSIT TO
DISCHARGE LIEN ON PUBLIC IMPROVEMENT.

SUPREME COURT,
NEW YORK COUNTY.

In the Matter of the Me-	}
chanic's Lien claimed by	
A. B.	
v.	
C. D. and the City of New	}
York. ¹	

CITY AND COUNTY OF NEW YORK, ss. :

C. D., being duly sworn, says that he is the contractor with the City of New York for the public improvement, to wit: [the construction of the sewer on Street from Street to Street in the City of New York] ; that A. B. is a sub-contractor under him for a portion of the said work and on the 1897 the said A. B. filed a notice of lien against deponent and upon the moneys of the City of New York applicable to the construction of such improvement, claiming that there was due [or to become due] and payable to him thereout the sum of \$. That the interest on said sum for the term of one year will amount to the sum of \$.

¹ Under the new charter this is the corporate title of the greater city.

Deponent desires to have the said lien discharged by making a deposit of money with the financial officer of said City and prays that an order may be entered fixing the amount of money to be deposited by him to obtain such discharge.

No previous application has been made for such an order.

C. D.

Subscribed and sworn to be-
fore me this day }
of 1897.

ORDER FIXING THE AMOUNT OF DEPOSIT TO DISCHARGE
LIEN ON PUBLIC IMPROVEMENT.

SUPREME COURT,
NEW YORK COUNTY.

In the Matter of the Me-
chanic's Lien claimed by
A. B.
v.
C. D. and the City of New
York.

It appearing to my satisfaction that C. D. is the contractor with the City of New York for a certain public improvement, to wit : [the construction of a sewer on Street between Street and Street in the City of New York]; and that A. B. is a subcontractor under said C. D. for a portion of said work and that A. B. on the 1897, filed a notice of lien against C. D. and upon the moneys of the City of New York applicable to the construction of such improvement, claiming that there was due [or to become due] and payable to him thereout the sum of \$. Now, on motion of , attorney for C. D., it is

Ordered, That upon the deposit by C. D. with the Comptroller of the City of the City of New York of the sum of \$, the said lien of A. B. be discharged and that the said Comptroller so enter it upon his "lien book" with a reference thereon to this order ; and that the fund so deposited remain subject in all respects to the said lien, until the same shall cease and determine.

LIS PENDENS.
(ON PUBLIC IMPROVEMENT.)

SUPREME COURT.

NEW YORK COUNTY.

A. B.	Plff.,	}	Notice of Pendency of Action.
<i>v.</i>			
C. D. and the City of New York,			
Defts.			

Notice is hereby given, that an action has been commenced, and is pending in this court upon a complaint of the above-named plaintiff against the above named defendants for the foreclosure of a certain notice of claim of Mechanic's Lien, for the sum of \$, filed by the plaintiff with [Com. of Public Works of the City of New York] the head of the department or bureau having charge of the construction therein mentioned and with [Comptroller of the City of New York] the financial officer of the said municipal corporation, on the day of 1897, in which the defendant, C. D., is named as contractor and upon the moneys of such corporation applicable to the construction of such improvement, to the extent of the amount due or to become due on such contract.

That the contract pursuant to which said public improvement was constructed [or is being constructed] was

made between the [City of New York] and C. D. [for the construction of a brick sewer under Street from Street to Street in the City of New York, including the excavation for said sewer and the relaying of the pavement upon said street, according to the specifications therefor for the sum of \$. New York, 1897.

_____, _____,
Plff's Attorney
New York, N. Y.

COMPLAINT
 ON FORECLOSURE OF LIEN ON PUBLIC IMPROVEMENT.

SUPREME COURT,
 NEW YORK COUNTY.

A. B.,	} Plff.,
v.	
C. D. and the City of New York,	
E. F., G. H.,	
	Defts. }

The plaintiff above named complains to this Honorable Court and avers :

I. That heretofore and prior to [date of sub-contract] defendant, C. D., entered into an agreement with the defendant, the City of New York,¹ to [give substance of contract, *e. g.* to build a brick sewer, etc.]

II. That thereafter and on or about the _____ day of _____ 1897, this plaintiff entered into an agreement [in writing] with defendant, C. D., to [give substance of sub-contract *e. g.* to lay the brick for the sewer for (give terms)].

III. That the said contract has been completed by C. D.

¹ Under the new charter, this is the corporate title.

[or if incomplete, state the condition in which it is] and there is due and payable to C. D. thereunder the sum of \$; that this plaintiff has fully performed his contract with C. D. and has [state specifically what has been done, *e. g.* has laid all the brick required to be laid in and about the construction of said sewer] and become entitled to receive on account thereof the sum of \$.

IV. That no part of said sum of \$ has been paid to plaintiff [except the sum of \$ on account] and that there is now due and owing to plaintiff from defendant, C. D., the sum of \$.

V. That on the day of 1897 [and after the said sum has become due and payable] and within thirty days after the completion and acceptance of said public improvement by the said [City of New York] this plaintiff caused to be filed with the [Commissioner of Public Works] the head of the department of bureau having charge of such construction and with the [Comptroller of the City of New York] the financial officer of the said municipal corporation, a notice of claim and lien, in writing, for the amount of the value of the labor [and materials] aforesaid [less the part payment above mentioned] to wit, the sum of \$, which notice specified the name and residence of the plaintiff as lienor, the name of the contractor [or sub-contractor] for whom the labor was performed [or materials furnished] the amount claimed to be due [or to become due], the date when due, a description of the public improvement upon which the labor was performed [and materials expended], the kind of labor performed and materials furnished and which notice gave a general description of the contract pursuant to which such public improvement was constructed.

That said lien and claim was thereupon on said day of 1897, duly entered by said [Comptroller of the City of New York] in the "lien-book" kept by him in his office for that purpose.

VI. That said lien and claim has not been paid, can-

celled or otherwise discharged and no other action or proceeding has been brought by this plaintiff for the foreclosure of the same or for the recovery of the moneys intended to be secured thereby.

VII. That the defendants E. F., G. H., etc., and no others have filed mechanics' liens upon the moneys of the [City of New York] applicable to the construction of said public improvement above mentioned.

Wherefore plaintiff demands judgment.

1. That the amount due upon his lien and claim for principal and interest, be ascertained, determined and adjudged.

2. That the rights, interests and priorities of this plaintiff and all the defendants be ascertained, determined and adjudged.

3. That this plaintiff be adjudged to have a valid and subsisting lien upon the funds or moneys of the [City of New York] applicable to the construction of the public improvement above mentioned, and which may be due from the [City of New York] to C. D., as of the date of filing the said lien, to wit :

1897, for the sum
of \$ and interest thereon from the day of
1897, and the costs and disbursements of this
action.

4. That the defendants, and each of them, and all persons claiming under them or any of them subsequent to the filing of the notice of the pendency of this action in the office of the [Comptroller of the City of New York] be barred and foreclosed of all right, claim, lien or equity of redemption in and to the said funds or moneys above mentioned.

5. That this plaintiff may be paid out of said funds or moneys above mentioned the amount due him with interest to the time of such payment, and the costs and expenses of this action, so far as the amount properly applicable thereto will pay the same, and that the defendant, C. D., be adjudged to pay any deficiency which

may remain after applying all of the said moneys properly applicable thereto.

6. That this plaintiff may have such and further judgment, order or relief as may be just.

_____,
Attorney for Plaintiff.

(*Verification.*)

For certain contingencies, *i. e.* if contract be unfinished, or if a bond be given or a deposit made, follow the suggestions for such cases, *ante*, pp. 193. 195. 196, and make necessary changes.

ANSWER.

Follow suggestions, *ante*, pp. 198, 199.

JUDGMENT.

(PUBLIC IMPROVEMENT.)

Use form on pp. 199, 200, *ante*, to the words "and that he have execution therefor," and then add

That plaintiff on _____ 1897, by filing the notice of mechanic's lien mentioned and described in the complaint acquired a good, valid and subsisting lien upon the moneys of the [City of New York] applicable to the construction of the public improvement in said lien mentioned for said last mentioned sum.

[If a defendant's lien set up affirmatively in his answer, has been sustained by the court or referee, say:

On motion of _____, attorney for defendant,
_____, it is further

Ordered, That the defendant recover (as above).]

It is further

Ordered, adjudged and decreed, That the defendants and each of them, and all persons claiming under them, be barred and foreclosed of all right, claim, lien or equity of redemption in the above-mentioned moneys, and it is further

Ordered, that the [City of New York] pay over to the plaintiff A. B., or his attorney, the sum of \$; [and to defendant C. D., or his attorney, the sum of \$, etc., etc.]

For modifications of judgment in particular instances see forms given for foreclosure of liens on real property, *ante*.

TABLE OF CASES,

WITH CITATIONS FROM ALL SERIES OF REPORTS, AND
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